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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

UNITED PACIFIC INSURANCE CO.
and ORLANDO-ANASTASI JOINT VENTURE,
Petitioners,

v.

ANIERO CONCRETE CO., INC.,
Respondent.

Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

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QUESTION PRESENTED.

Does An Individual's Entry Into The Federal Witness Protection Program *Ipso Facto* Relieve That Individual Of His Liability To Penal Sanctions And His Liability For Pecuniary Judgments.

The parties to the proceedings below are plaintiff-respondent ANIERO CONCRETE CO., INC.; defendant-petitioners UNITED PACIFIC INSURANCE CO. and ORLANDO-ANASTASI JOINT VENTURE and defendants ANASTASI BROTHERS CORPORATION, JOSEPH S. ANASTASI, ORLANDO CONSTRUCTION CO., INC. and RUDOLPH ORLANDINI. At the conclusion of the trial, judgment on the jury's verdict was entered in favor of ANASTASI BROTHERS CORPORATION and JOSEPH S. ANASTASI. Judgment by default was entered against ORLANDO CONSTRUCTION CO., INC. and RUDOLPH ORLANDINI.

Petitioner UNITED PACIFIC INSURANCE CO. is a subsidiary of Reliance Insurance Company. It is affiliated with the following companies, all of which are subsidiaries of Reliance Insurance Company:

General Casualty Company of Wisconsin, General Casualty Company of Illinois, Pilot Insurance Company, Planet Insurance Company, Regent Insurance Company, Regent International Insurance Company, Ltd., Reliance Insurance Company of Illinois, Reliance Insurance Company of New York, Reliance Lloyds, United Pacific Insurance Company of New York, United Pacific Life Insurance Company, Reliance Life Insurance Company, United Pacific Reliance Life Insurance Company of New York, Reliance Risk Management, Inc., Reliance Special Risk, Inc., Reliance United Pacific Surety Managers, Inc., Reliance Reinsurance Management, Inc., Reliance Corporate Services, Inc., Reliance Specialty Lines General Agency, Inc., Cananwill, Inc., Cananwill Consumer Discount Company, Vector Group Marketing, Inc., General Financial Corporation, Uni-Pac Corporation, Relex Brokers, Inc., State Title Insurance Company, Commonwealth Land Title Insurance Company, Commonwealth Relocation Services, Inc., Commonwealth Mortgage Assurance Company.

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October Term, 1985

UNITED PACIFIC INSURANCE CO.
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Petitioners,

v.

ANIERO CONCRETE CO., INC.,
Respondent.

Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

Petitioners United Pacific Insurance Co. ("United Pacific" — a surety) and Orlando-Anastasi Joint Venture ("Joint Venture" — a general contractor) respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division ("Appellate Division") entered in this matter on May 6, 1985.

OPINION BELOW.

The Opinion of the Appellate Division is unreported. It is set out in the Appendix. (1a-5a).

JURISDICTION.

The Opinion and Judgment of the Appellate Division was entered on May 6, 1985. A Petition for Certification of Appeal from Final Judgment of the Appellate Division was filed by agreement of the parties and with the permission of the Supreme Court of New Jersey on June 28, 1985. By Order dated July 23, 1985 and filed July 24, 1985, the Supreme Court of New Jersey denied the petition for certification. (6a). This Petition for Writ of Certiorari has been filed within ninety days thereafter pursuant to 28 U.S.C. §2102(b) and Supreme Court Rules 20.2 and 20.4. The jurisdiction of this honorable Court is invoked in accordance with 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves Article VI, Clause 2, Amendment V and Amendment XIV, Section 1, of the United States Constitution, (9a-11a) the Federal Witness Protection Program ("Witness Protection Program") created pursuant to the Organized Crime Control Act of 1970, Pub.L. No. 91-452, §§501-04, 84 Stat. 922 (1970) *repealed by* Witness Security Reform Act of 1984 (12a-13a) and the Witness Security Reform Act of 1984, 18 U.S.C. §§3521-28, Pub.L. No. 98-473, 98 Stat. 2153, (14a-31a) and New Jersey Rule of Evidence 63(10). (59a). The provisions of the United States Constitution, of the laws of the United States and of the New Jersey Rule of Evidence are set forth in the Appendix.

STATEMENT OF THE CASE.

I. Factual Background.

This is a suit by plaintiff Aniero Concrete Co., Inc. ("Aniero Concrete") for sums allegedly due for subcontract concrete work on the Bella Vista Apartments Project in Union City, New Jersey. The defendants were

the Orlando-Anastasi Joint Venture, the general contractor for the construction of the project, the individual companies that comprised the Joint Venture, the principals of those companies and the United Pacific Insurance Co., the surety that issued a bond in support of the Joint Venture's undertakings. After a trial to a jury in the Superior Court of New Jersey, Law Division ("trial court"), judgment was entered in accordance with the verdict in favor of Anastasi Brothers Corporation and Joseph Anastasi. Judgment was entered on the jury's verdict in favor of Aniero Concrete against United Pacific and the Joint Venture.[1] Defendants United Pacific and the Joint Venture, petitioners in this honorable Court, respectfully pray that a Writ of Certiorari issue to the Superior Court of New Jersey, Appellate Division to review the judgment and opinion of the Appellate Division affirming the judgments entered in favor of Aniero Concrete against United Pacific and the Joint Venture.

At the trial, defendants introduced evidence to show that the contract on which Aniero Concrete's claim was based was a second, fraudulent contract entered into under duress and that an earlier contract in an amount approximately $400,000 less than the second contract was the operative contract. The defendants introduced evidence to show that the second, higher contract was entered into by the Joint Venture under the threat of imminent bodily harm to Joseph Anastasi, a principal of one of the Joint Venture participants, and that this higher contract was part of an overall scheme to defraud the New Jersey Housing Finance Authority.

Rudolph Orlandini provided much of the information upon which the defenses outlined above were based.

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1. Judgment by default was entered prior to trial against Orlando Construction Co., Inc. and Rudolph Orlandini.

Orlandini is enrolled in the federal Witness Protection Program administered by the United States Department of Justice. He was enrolled in the Witness Protection Program as a result of his cooperation in the investigations and trials of a number of public officials and private individuals involved in fraud and kick-back schemes in northern New Jersey. These trials, which led to convictions, are discussed in *United States v. Musto,* 540 F. Supp. 318 (D.N.J. 1982) and *United States v. Musto,* 540 F. Supp. 346 (D.N.J. 1982), *aff'd sub. nom., United States v. Aimone,* 715 F.2d 822 (3d. Cir. 1983), *cert. denied,* 104 S. Ct. 3585 (1984).

Orlandini provided the information which supported the defenses of duress and fraud at a series of interviews conducted by defendants' counsel under the auspices of the Witness Protection Program arranged through the cooperation of the United States Marshals Service. During these interviews, Orlandini made numerous statements describing the duress and the fraud.

During his intervews Orlandini expressed a willingness to testify at a deposition, though not at trial, and to restate under oath the statements he had made during the interviews. On February 4, 1984, Orlandini appeared at a deposition and testified, under oath, that he had chosen to forget everything that he had stated at the prior interviews.

The statements made earlier by Orlandini strongly supported the defendants' contention that the second, higher contract was entered into under duress and as part of a scheme to defraud the New Jersey Housing Finance Agency. The statements would subject Orlandini to civil and criminal liability for conspiracy, conversion and fraud and to civil liability for breach of contract, breach of fiduciary duty and negligence as well as to claims for indemnity and contribution.

The defendants proposed to introduce these statements at trial as part of their defense presentation.

II. Procedural History.

Prior to trial, plaintiff's counsel was informed that the defendants intended to offer into evidence the statements made by Rudolph Orlandini. These statements, which were to provide support for the defendants in presenting their defenses of fraud and duress, were to be submitted to the jury by the defendants, despite their hearsay character, as declarations against interest.

During the trial, plaintiff's counsel sought an *in limine* ruling from the trial court that the statements were not admissible as hearsay and that the declaration against interest exception was inapplicable. The question was fully briefed and argued to the trial court.

After hearing argument, the trial court ruled that the statements made by Orlandini were admissible. Prior to admitting the statements, however, the trial court gave plaintiff time to appeal its ruling to the Appellate Division.

Argument on this interlocutory appeal was heard by the Appellate Division immediately. On March 9, 1984, the Appellate Division issued a brief order reversing the ruling of the trial court and prohibiting the introduction of Orlandini's statements. The order stated:

> [i]n the unique circumstances in which [the statements] were made by one in the FBI's witness protection program, they do not qualify under *Evid. R.* 63(10).

(8a).

On March 13, 1984, the Supreme Court of New Jersey denied defendants' request for leave to appeal from the interlocutory decision of the Appellate Division.

The trial proceeded without the introduction of the Orlandini statements. The jury returned a verdict

against the Joint Venture and against United Pacific but not against the individual defendant, Joseph Anastasi or his company, Anastasi Brothers Corporation.

The plaintiff, the Joint Venture and United Pacific appealed to the Appellate Division. In the Appellate Division, the Joint Venture and United Pacific renewed the contention made earlier by all of the defendants that the statements of Orlandini were admissible as declarations against interest and that the Appellate Division had erred in its earlier order precluding their introduction.

On May 6, 1985 the Appellate Division filed the only opinion delivered in this matter. In its opinion, the Appellate Division again held that the statements of Orlandini were not admissible as declarations against interest because Orlandini was enrolled in the federal Witness Protection Program.

The Appellate Division stated that upon entering the federal Witness Protection Program, Orlandini was relieved of "all claims, charges and responsibilities to which he may be subject as Rudolph Orlandini." (2a). The Appellate Division concluded that the Orlandini statements "do not qualify as declarations against interest because they were made when Orlandini knew that as a practical matter he would be free of any adverse consequences from his words because of his entry into the government's witness-protection program." (4a).

Thus, the Appellate Division held, incorrectly, that the Witness Protection Program extinguished all pre-enrollment liabilities of those enrolled in the program and that as a result of that extinguishing there was no interest against which a declaration could be made.

United Pacific and the Joint Venture filed a Petition for Certification of Appeal from Final Judgment of the Appellate Division with the Supreme Court of New Jersey. By order dated July 23, 1985 and filed July 24, 1985, the Supreme Court of New Jersey denied the Petition for Certification. (6a).

The Appellate Division precluded the introduction of vital statements in the trial of this matter. It did so because of its erroneous conclusion that an individual's entry into the federal Witness Protection Program *ipso facto* relieves that individual of his liability to penal sanctions and his liability for pecuniary judgments. The conclusion of the Appellate Division is wrong; it must be corrected.

REASONS FOR GRANTING THE WRIT.

I. Background.

A. The Witness Protection Program.

The Witness Protection Program was created pursuant to the Organized Crime Control Act of 1970 to provide protection and security for witnesses and potential witnesses who would testify in official proceedings on behalf of the government. Responsibility for the provision of the required protection was assigned to the Attorney General and has been delegated by the Attorney General to the United States Marshals Service. *See*, 28 C.F.R. §0.111(c). As it has evolved, a primary means used by the Marshals Service in providing that protection to the enrolled witness is relocation of the witness. Such relocation is often accompanied by the establishment of a new identity for the witness.[2] *See* H.R. Rep. No. 98-1030, 98th Cong., 2d Sess. (1984) *reprinted in* [1984] *U.S. Code Cong. & Ad. News* 3182, 3548 (1984). *See generally* Note, *Enforcing Judgments Against Participants in the Witness Protection Program*, 36 STAN.L.REV. 1017 (1984).

2. Occasionally, the witness is protected by incarceration. *See Beltran v. Smith*, 458 U.S. 1303 (Rehnquist, Circuit Justice, 1982).

While the witness entering the Witness Protection Program may be relocated and may receive a new identity, the prior obligations and liabilities of that witness are neither cancelled nor expunged. Rather, the obligations and liabilities follow the witness. *See* 18 U.S.C. §§3521-23; *Witness Protection Program: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess.* Exhibit 29.[3]

Rudolph Orlandini was enrolled in the Witness Protection Program (8a); *see generally United States v. Aimone,* 715 F.2d 822 (3d Cir. 1983), *cert. denied,* 104 S.Ct. 3585 (1984). He may have been relocated; he may have received a new identity. He was not relieved of his obligations nor of his liabilities.

B. The Appellate Division's Decisions.

At the trial, the defendants sought to introduce statements made by Orlandini. These statements of Orlandini, central to the defendants' defense, if acted upon, would subject Orlandini to civil liability for conversion, fraud, breach of contract, breach of fiduciary duties, negligence, indemnity and contribution and to criminal sanctions for conspiracy, conversion and fraud. The statements made by Orlandini were contrary to his pecuniary interest and to his penal interest.

N.J.R. Evid. 63(10) permits the admission of hearsay statements if those statements are declarations against interest. The Rule provides:

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3. The continuing obligations of witnesses enrolled in the Witness Protection Program are described in section II, *infra*.

DECLARATIONS AGAINST INTEREST

> A statement is admissible if at the time it was made it was so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, except that such a statement is not admissible against a defendant other than the declarant in a criminal prosecution.

Despite N.J.R. Evid. 63(10), on two occasions, by interlocutory order during trial, and on appeal from the judgment of the trial court, the Appellate Division required the exclusion of Orlandini's statements. The Appellate Division excluded these statements against interest on the basis that the declarant, Orlandini, had no interest to which his statements could be contrary because, and only because, Orlandini was enrolled in the federal Witness Protection Program.

In ordering the exclusion of the evidence on an interlocutory basis, the Appellate Division stated:

> We reverse the order entered in the trial court this day admitting the testimony of Susan Carrochi concerning alleged statements against interest made by Mr. Orlandini in reliance on *Evid. R.* 63(7) and (10). The statements are not offered against Mr. Orlandini as a party under *Evid. R.* 63(7) and, in the unique circumstances in which they were made by one in the FBI's ~~prisoner~~ *witness* protection program, they do not qualify under *Evid. R.* 63(10).

(7a-8a).

In its decision on the appeal of the final judgment, the Appellate Division restated and elaborated on its conclusion that an individual enrolled in the Witness Protection Program has neither a personal nor a pecuniary interest against which statements can be made. The Appellate Division stated:

> The developer, defendant Orlando-Anastasi Joint Venture, is a partnership consisting of defendant Orlando Construction Co., Inc. and defendant Anastasi Brothers Corporation. Defendant Rudolph Orlandini is the principal of Orlando Construction Co., Inc., and defendant Joseph S. Anastasi is the principal of Anastasi Brothers Corporation. After this dispute arose, Rudolph Orlandini testified for the United States government in a political corruption trial involving, among other things, the construction of the apartment building that is the subject of this action. In return for his testimony, the government altered Orlandini's identity, *thus in effect relieving him of all claims, charges and responsibilities to which he may be subject as Rudolph Orlandini.*
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> * * *
>
> . . . The trial judge ruled that the [Orlandini's] statements were admissible as admissions and declarations against interest. We summarily reversed that order because the judge erred in applying both hearsay exception rules. The statements do not qualify as admissions because they were offered as evidence against plaintiff and not against the party declarant. *R.* 63(7). *They do not qualify as declarations against interest because they were made when Orlandini knew that as a practical matter he would be free of any adverse consequences from his words*

because of his entry into the government's witness-protection program. R. 63(10).

(2a-4a). (emphasis added).

II. The Witness Protection Program Does Not Extinguish A Witness' Exposure To Criminal Penalty Or To Civil Liability.

The Appellate Division's conclusion that the Witness Protection Program in operation relieves a witness "of all claims, charges and responsibilities" is unsupported and unsupportable.

From the Program's beginnings in 1970 to the present, a potential enrollee in the Program has been required to enter into a Memorandum of Understanding with the Justice Department. *See Franz v. United States*, 707 F.2d 582, 588 (D.C. Cir. 1983) (*"Franz I"*). An example of such a Memorandum of Understanding was proffered as an exhibit during oversight hearings held in 1978. *Witness Protection Program: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. Exhibit 29. (*"Memorandum of Understanding"*).

The *Memorandum of Understanding* by its terms sets forth the obligations of the enrolling witness. (32a-58a). The *Memorandum of Understanding* states:

> Such actions as returning to the danger area without United States Marshals Service protection or against instructions of United States Marshals Service Personnel, and involvement in criminal activity will result in *IMMEDIATE TERMINATION* from the Witness Protection Program. Likewise, the United

> States Marshals Service WILL NOT SHIELD witnesses from civil or criminal litigation initiated prior to or subsequent to entry into the Program.

(35a). (emphasis in original).

It requires potential witnesses to resolve their civil debts.

> Arrangements must be made with creditors immediately, to settle all debts. Failure to do so will jeopardize participation in the Witness Protection Program since *the United States Marshals Service WILL NOT SHIELD witnesses from legitimate creditors*. Failure to settle debts may result in the disclosure of location to creditors.

(40a). (emphasis in original).

It requires witnesses enrolled in the Witness Protection Program to make themselves amenable to service of process in civil actions.

> Witnesses may appoint private counsel to settle debts in their behalf. Payment of private counsel is the sole responsibilty of the witness, and the United States Marshals Service assumes no responsibility for payment of private counsel. Witnesses may appoint private counsel to receive service of process in their behalf. If private counsel is not appointed, the witness hereby designates the General Counsel, United States Marshals Service, to receive and forward all process to the witness. The witness must then take those steps necessary to respond to said process.

(40a).[4]

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4. *See also* Statement of William E. Hall, United States Marshals Service, *Witness Protection Program: Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. at 90, 93.

> When a witness is sued, the Marshals Service agrees to serve process on behalf of the litigant seeking to obtain jurisdiction over the relocated witness. The Marshals Service does

In 1984 Congress adopted the Witness Security Reform Act of 1984. The conditions previously imposed on enrolled witnesses through the *Memorandum of Understanding* were now statutorily required as well. Section 3521(d) of The Witness Security Reform Act, 18 U.S.C. §3521(d), provides:

> (d)(1) Before providing protection to any person under this chapter, the Attorney General shall enter into a memorandum of understanding with that person. Each such memorandum of understanding shall set forth the responsibilities of that person, including —
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> * * *
>
> (B) the agreement of the person not to commit any crime;
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> * * *
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> (D) the agreement of the person to comply with legal obligations and civil judgments against that person;
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> * * *

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this by making personal service on the witness and providing the litigant and the Clerk of the Court where the controversy is pending with what is known as a "blind return." A blind return is simply a statement indicating the time, date, and manner of service, with a notation that evidence of other aspects of service will be provided should the witness contest the accuracy of the statements made in the return. To date production of such evidence has never become necessary.

In the event that a witness refuses to honor a judgment obtained pursuant to litigation initiated over him, the Marshals Service would be willing to disclose his location to a litigant in order to afford the litigant with an opportunity to satisfy his claim.

> (F) the agreement of the person to designate another person to act as agent for the service of process; . . . .

Continuing with the Act's explication of the obligations of enrolled witnesses, in Section 3523 of the Witness Security Reform Act, 18 U.S.C. §3523 it is provided, in pertinent part:

> (a) If a person provided protection under this chapter is named as a defendant in a civil cause of action arising prior to or during the period in which the protection is provided, process in the civil proceeding may be served upon that person or an agent designated by that person for that purpose. The Attorney General shall make reasonable efforts to serve a copy of the process upon the person protected at the person's last known address. The Attorney General shall notify the plaintiff in the action whether such process has been served. If a judgment in such action is entered against that person the Attorney General shall determine whether the person has made reasonable efforts to comply with the judgment. The Attorney General shall take appropriate steps to urge the person to comply with the judgment. If the Attorney General determines that the person has not made reasonable efforts to comply with the judgment, the Attorney General may, after considering the danger to the person and upon the request of the person holding the judgment disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment.

The Witness Security Reform Act further provides that one who holds a judgment against an enrolled witness can bring an action in the appropriate United States district court, in which proceeding the Attorney General must disclose the identity of the enrolled person against whom the judgment runs either to the judgment holder

or to a guardian appointed by the court. 18 U.S.C. §3523(b)(1)-(3).

The Report of the House of Representatives that accompanied the Witness Security Reform Act restates the principal that there is no immunity from civil actions or civil judgments for those enrolled in the Witness Protection Program even if those civil actions are based on pre-enrollment activities. The Report states:

> Subsection (c) deals with the occasional but vexing problem of a citizen who has a civil cause of action against a protected person who is stymied in his efforts to litigate because he cannot learn the new identity or whereabouts of the potential defendant. Under subsection (b)(6) disclosure of such information for the purpose of serving process would generally be forbidden. It is not the intent of the witness relocation and protection program to deprive otherwise innocent persons of their right to litigate civil claims for damages; however, a balance must be struck to ensure protection of the witness. Subsection (c) seeks to strike such a balance.

H.R. Rep. No. 98-1030, 98th Cong., 2d Sess. *reprinted in* [1984] *U.S. Code Cong. & Ad. News*, 3182, 3549.

Thus, the conclusion of the Appellate Division that Orlandini's enrollment in the Witness Protection Program "reliev[ed] him of all claims, charges and responsibilities to which he may be subject as Rudolph Orlandini" (2a) is unsupportable. It is wrong. It requires correction.

III. The Appellate Division's Explication Of The Witness Protection Program, If Left Uncorrected, Would Diminish Substantially The Utility Of This Important Federal Program.

Individuals enrolled in the Witness Protection Program assist in the struggle against organized crime. H.R. Rep. No. 98-1030, 98th Cong., 2d Sess. *reprinted in* [1984] *U.S. Code Cong. & Ad. News* 3182, 3545. On occasion, information received from protected witnesses is employed in official proceedings not through the actual testimony of the protected witnesses but through other witnesses whose testimony includes statements made to them by protected witnesses. This testimony of statements, this hearsay testimony, is admitted and used. A basis for using this hearsay testimony is that the reports are reliable because the statements are against the protected witness' penal interests.

This use of statements made by protected witnesses, the reliability of which is attested to because the statements are against the penal interest of the witness/declarant is illustrated in the recent decision of the United States Court of Appeals for the Second Circuit in *United States v. Napolitano*, 761 F.2d 135 (2d Cir. 1985). In *Napolitano*, the Court of Appeals approved the use by the district court during sentencing of information supplied by informants who provided statements to the government but who did not testify.[5] The Court of Appeals stated:

> At the hearing, defendant challenged the government's use of informant information but

5. The hearsay statements introduced in *Napolitano* were used in a sentencing proceeding; in *United States v. Harris*, 403 U.S. 573 (1971) the hearsay statements were used in the decision to authorize the issuance of a search warrant. This case is a civil action for money damages. The difference between these types of proceedings should not alter the fundamental conclusion. Declarations against interest should be admissible.

failed to adduce any evidence suggesting that the information was false. To the contrary, defendant declined to testify or even to supply information of his financial condition to the Probation Department.

Defendant's counsel persistently sought to ascertain whether the informants who had supplied the information of defendant's activities were in the Witness Protection Program (WPP) and to have them appear at the hearing as witnesses. The judge refused to honor these requests, stating "even narrowing down the witnesses to a limited number of possible informants would place their lives in jeopardy," and the WPP is not sufficiently secure to protect the lives of the informants. The Court also stated that the WPP "ends at some time" and that "because their lives are in jeopardy," the witnesses were unavailable.

Hearsay information may unquestionably be used in the discretion of a sentencing judge and given such weight as appears in his discretion to be merited. Such information does not violate due process requirements.

* * *

The corroboration needed for the information placed before the judge was adequately supplied by the large number of informants who confirmed that defendant was involved in obstruction of justice and was associated with a known crime family figure as a trusted associated and collector for him. *See Fatico II*, 603 F.2d at 1057. *The evidence came from sources who supplied evidence against their own penal interest, establishing reliability. Cf. United States v.*

Harris, 403 U.S. 573, 580, 583-84, 91 S.Ct. 2075, 2080, 2081-82, 29 L.Ed.2d 723 (1971) (plurality).

761 F.2d at 139. (emphasis added).[6]

Statements made by informants, made by witnesses enrolled in the Witness Protection Program, are thus most useful. Although hearsay, the statements are probative and admitted because they are reliable. The statements are reliable because they are against the declarants' interests, both penal and pecuniary. *Compare Fed.R.Evid.* 804(b)(3).[7]

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6. This honorable Court addressed the issue of informant statements and declarations against interest in *United States v. Harris*, 403 U.S. 573 (1971). Announcing the Judgment of this honorable Court, Mr. Chief Justice Burger, in an opinion, or portion thereof, joined by Mr. Justice Black, Mr. Justice White and Mr. Justice Blackmun stated:

> Here the warrant's affidavit recited extrajudicial statements of a declarant, who feared for his life and safety if his identity was revealed, that over the past two years he had many times and recently purchased "illicit whiskey." These statements were against the informant's penal interest, for he thereby admitted major elements of an offense under the Internal Revenue Code.
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> • • •
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> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility — sufficient at least to support a finding of probable cause to search.

403 U.S. at 583. *See Chambers v. Mississippi*, 410 U.S. 284 (1973).

7. The Advisory Committee on the Proposed Rules describing this exception to the hearsay rule stated:

> The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.

Notes of Advisory Committee on Proposed Rules.

The decision of the Appellate Division, in error, stripes away the factual underpinning of this important exception to the hearsay rule. The Appellate Division has held that an individual enrolled in the Witness Protection Program has neither a penal risk nor a pecuniary liability. Such a person has no penal or proprietary interest. Without any such interest to be placed at risk, there is no basis upon which to test the declarant's statements. Thus, the reliability of the statements cannot be gauged. Because the statements cannot be tested for reliability, they must be deemed unreliable and therefore unusable. Following the inexorable logic flowing from the Appellate Division's false premise, no statement made by an individual enrolled in the Witness Protection Program could be admitted as a declaration against interest. Each statement of an enrolled witness if it were to be admitted would have to be based on another exception to the hearsay rule.

The limitation on informants' statements compelled by the logic of the Appellate Division's conclusion would decrease the availability of such useful statements. That limitation would preclude utilization of statements helpful in the fight against organized crime.

The Appellate Division's decision would diminish substantially the utility of the Witness Protection Program. That should not be allowed to happen. The decision of the Appellate Division should be reversed.

IV. The Decision Of The Appellate Division Impermissibly Intrudes On An Important Federal Program.

The Witness Protection Program was created by Congress and is administered by the Department of Justice. In establishing the program and in continuing it, the Congress balanced the important need of society to

fight organized crime against the losses or potential losses to be suffered by individuals and by society if persons by being enrolled in the Witness Protection Program could escape personal liability and responsibility for their pre-enrollment acts. The Congress in continuing the Witness Protection Program, and the Department of Justice in administering the Program, struck the balance. Both the legislative and executive branches of the federal government concluded that the need in the fight against organized crime to protect witnesses could not outweigh the rights of individuals and society to have redress for pre-enrollment activities. Both of these branches of the federal government concluded that entry into the Witness Protection Program should not provide an individual with a shield from criminal or civil responsibility for pre-enrollment acts.

The Appellate Division's decision at best ignores the balance struck by the government of the United States; at worst it upsets the balance totally. Such a result is prohibited by Article VI, Clause 2 of the United States Constitution. The decision of the Appellate Division must be reversed.

V. The Appellate Division's Interpretation Of The Witness Protection Program, If Uncorrected, Results In A Major Intrusion Of Federal Authority In An Area Of Principal Interest to the States.

Reconciliation of commercial and financial obligations between private parties is a task performed by the states; it is an area governed by state law. As interpreted by the Appellate Division, the Witness Protection Program profoundly affects those state law interests.

The Appellate Division's version of the Witness Protection Program includes within that Program an adjustment of private financial obligations. The Appellate Division's version includes a provision which apparently

provides that all of an enrolling witness' debts are extinguished. It includes a provision terminating the rights of all who are owed money by the enrolling witness.

If this rearrangement of private financial obligations is an intended aspect of the Witness Protection Program, it represents a major intrusion by the federal government into an area occupied by the states. While such an intrusion may be permissible, it should not be assumed absent a clearly manifested Congressional direction. *See Franz v. United States*, 712 F.2d 1428, 1435-37 (D.C. Cir. 1983) (*"Franz II"*) (Bork, J., concurring and dissenting).

As has been set forth at length earlier, the Appellate Division's interpretation of the Witness Protection Program is wrong. If corrected, there is no intrusion into state created rights. The Appellate Division's decision should be corrected.

VI. The Appellate Division's Interpretation Of The Witness Protection Program, If Uncorrected, Calls Into Question The Constitutionality Of The Witness Protection Program.

The Appellate Division concluded that upon his entry into the Witness Protection Program, Orlandini was relieved "of all claims, charges and responsibilities to which he may be subject as Rudolph Orlandini." (2a) The Appellate Division's statement, on its face, would preclude anyone from recovering anything from Orlandini for any pre-enrollment action of his. The Appellate Division's decision certainly appears to state that by enrolling Orlandini in the Witness Protection Program the federal government freed him from all civil liability. There is no suggestion in the decision that this Appellate Division-created liability-relieving aspect of

the Witness Protection Program is somehow special for Orlandini. Rather, the Appellate Division's opinion seems to hold that as an aspect of the Witness Protection Program the federal government frees from civil liability for pre-enrollment obligations all who it enrolls in that Program.

The obligations from which the enrolled witness is allegedly freed are important property rights of those to whom that enrolled witness is civilly liable. By way of illustration, in this case there may be claims that can be asserted against Orlandini by United Pacific, by the Joint Venture and by Anastasi Brothers Corporation for breach of contract, for fraud, for indemnity and for contribution. If the Appellate Division's decision is permitted to stand, various parties who may assert claims against Orlandini, including the petitioners, will be deprived of those claims by operation of the federal Witness Protection Program. Their property would have been taken for a public purpose without just compensation contrary to Amendment V of the United States Constitution.

As discussed in Section II, *supra*, the Witness Protection Program does not extinguish an enrolled witness' civil liabilities. Thus, given that the goals sought by the government in protecting witnesses can be achieved without a taking of the claimants' property, if the Appellate Division's rule were to stand, the claimants' property would have been taken without due process in violation of Amendment V and Amendment XIV of the United States Constitution. *See Franz I, supra*, 707 F.2d at 607. *But see Melo-Tone Vending, Inc. v. United States*, 666 F.2d 687 (1st Cir. 1981).

An implementing interpretation of the Witness Protection Program that would render the program unconstitutional is obviously less desirable than an interpretation that would not so threaten the Program. *Compare Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandies, J., concurring) ("When

the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.")

The decision of the Appellate Division threatens the Witness Protection Program. The decision should be rejected.

CONCLUSION

For each and all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

PETER F. MARVIN
(Counsel of Record)
EDWARD M. DUNHAM, JR.

Attorneys for Petitioners
UNITED PACIFIC
INSURANCE CO.
and ORLANDO-ANASTASI
JOINT VENTURE

Dated: October 21, 1985

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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4094-83T3

ANIERO CONCRETE CO., INC.,
Plaintiff-Appellant and Cross-Respondent,

v.

ORLANDO-ANASTASI JOINT VENTURE, ANASTASI BROS. CORP., JOSEPH S. ANASTASI and UNITED PACIFIC INSURANCE CO.,
Defendants-Respondents

and

ORLANDO-ANASTASI JOINT VENTURE and UNITED PACIFIC INSURANCE CO.,
Cross-Appellants,

and

ORLANDO CONSTRUCTION CO., and RUDOLPH ORLANDINI,
Defendants.

Argued March 26, 1985 — Decided May 6, 1985

Before Judges Pressler and Brody.

On appeal from Superior Court of New Jersey, Law Division, Bergen County.

John M. Agnello argued the cause for appellant (Cecci & Politan and Robert A. Baron, attorneys; Mr. Agnello on the brief).

Edward M. Dunham, Jr., a member of the Pennsylvania Bar, argued the cause *pro hac vice* for the respondents (Bourne, Noll & Kenyon, attorneys; Mr. Dunham on the brief).

PER CURIAM

Plaintiff, a subcontractor, recovered judgment in the amount of $390,375 against the developer of an apartment building and its bonding company. The judgment is based on a jury verdict and represents the balance claimed due plus $40,096.84 in extras for items outside the subcontract. The jury also found that plaintiff was entitled to interest, but the trial judge ruled that interest is not recoverable because "there was a substantial dispute over substantial monies." Both sides appeal. Defendants contend that the judge erroneously answered a question from the jury during their deliberations and that this court erred in reversing the judge's order admitting certain hearsay evidence. Plaintiff contends that it is entitled to interest by the terms of the subcontract. We reject defendants' contentions, accept the substance of plaintiff's contention and remand for a determination of the amount of interest due.

The developer, defendant Orlando-Anastasi Joint Venture, is a partnership consisting of defendant Orlando Construction Co., Inc. and defendant Anastasi Brothers Corporation. Defendant Rudolph Orlandini is the principal of Orlando Construction Co., Inc., and defendant Joseph S. Anastasi is the principal of Anastasi Brothers Corporation. After this dispute arose, Rudolph Orlandini testified for the United States government in a political corruption trial involving, among other things, the construction of the apartment building that is the subject of this action. In return for his testimony, the government altered Orlandini's identity, thus in effect relieving him of all claims, charges and responsibilities to which he may be subject as Rudolph Orlandini.

Orlandini and his corporation defaulted in the present action. He was unavailable as a witness.

One of defendants' defenses is that plaintiff and Orlandini entered into a written agreement in which Orlandini acknowledged that $400,000 was due plaintiff under the subcontract and that Orlandini and his corporation would pay that sum in return for plaintiff's cancellation of a stop notice. Defendants contend that the agreement was a novation constituting an accord and satisfaction of all claims plaintiff had against them. Plaintiff contends that the Orlandini agreement was merely added security given in return for the cancellation of the stop notice and that it never intended to release defendants from the subcontract.

In its question the jury asked, in effect, whether Orlando Construction Co., as a general partner in the venture, had "the legal right to satisfy a debt that is properly the debt of the joint venture." No one seemed to know what the jury meant. Defendants' attorney took the position that the judge should simply answer "yes," but plaintiff's attorney argued that such an answer would constitute an invasion of the jury's fact-finding province. Instead of asking the jury what the question meant, the trial judge repeated to them the elements of an accord and satisfaction. The jury accepted the answer with no comment and resumed their deliberations.

The issue before the jury regarding the Orlandini agreement was whether plaintiff intended it to be a novation releasing defendants, not whether defendants authorized Orlandini to enter into it. The judge assumed the question to be directed to the accord and satisfaction issue and answered it accordingly. The jury seemed satisfied with the answer. We do not see how defendants were prejudiced by it.

In the course of being interviewed by defendants' attorneys in preparation for trial, Orlandini allegedly made certain statements against his interest which they claim support one or more of their defenses to this action.

They proposed to call as a witness an employee of their law firm to repeat some of Orlandini's statements that she had allegedly heard. The trial judge ruled that the statements were admissible as admissions and declarations against interest. We summarily reversed that order because the judge erred in applying both hearsay exception rules. The statements do not qualify as admissions because they were offered as evidence against plaintiff and not against the party declarant. *R.* 63(7). They do not qualify as declarations against interest because they were made when Orlandini knew that as a practical matter he would be free of any adverse consequences from his words because of his entry into the government's witness-protection program. *R.* 63(10). We will not rule on these same points again. *State v. Stewart*, 196 *N.J. Super.* 138, 143-144 (App. Div. 1984). The inclusion of admissible hearsay statements of others in Orlandini's statement does not render his statement admissible.

The subcontract provides that "[a]ny monies not paid when due to either party under this Subcontract shall bear interest at the legal rate in effect at the place of the Project." This is an enforceable provision of the subcontract. *See Utica Mutual Insurance Co. v. DiDonato*, 187 *N.J.Super.* 30, 43 (App. Div. 1982). The judge mistakenly treated defendants' argument that plaintiff is not entitled to interest as though the parties had not already provided for payment of interest in their agreement. When an agreement is silent regarding the payment of prejudgment interest, courts have adopted various equitable approaches in deciding whether to award prejudgment interest. Here the agreement is not silent.

The interest provision, however, leaves open two questions: what "legal rate" the parties intended to apply and whether the provision covers payment for extras outside the contract. These questions cannot be adjudicated without a trial. If the interest provision does not cover all

of the extras, the trial judge must decide as to those extras not covered whether it would nevertheless be "equitable" to award prejudgment interest. *See Bak-A-Lum Corp. v. Alcoa Building Products*, 69 *N.J.* 123, 131 (1976).

Remanded for trial as to interest consistent with this opinion. The judgment is otherwise affirmed. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk

SUPREME COURT OF NEW JERSEY
C-1036 SEPTEMBER TERM 1984

24,111

ANIERO CONCRETE, CO., INC., *Plaintiff-Respondent,*	:	
vs.,	:	
ORLANDO-ANASTASI JOINT VENTURE, et al., *Defendants-Petitioners.*	:	ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4094-83T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 23rd day of July, 1985.

CLERK OF THE SUPREME COURT

ORDER ON MOTIONS/PETITIONS

ANIERO CONCRETE CO., INC.,
Plaintiff-Appellant,
vs.
ORLANDO-ANASTASI JOINT VENTURE, et al.,
Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
BEFORE PART B

Judges Botter and Pressler

MOVING PAPERS FILED_____
ANSWERING PAPERS FILED_____
DATE SUBMITTED TO COURT_____
DATE ARGUED_____
DATE DECIDED_____

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION/PETITION FOR Leave to Appeal	X		X

from an evidence ruling during trial.

SUPPLEMENTAL:

We grant plaintiff's motion for leave to appeal and decide the ~~motion~~ *issue* summarily pursuant to *R.* 2:11-2.

We reverse the order entered in the trial court this day admitting the testimony of Susan Carrochi, concerning alleged statements against interest made by Mr. Orlandini in reliance on *Evid. R.* 63 (7) and (10).

The statements are not offered against Mr. Orlandini as a party under *Evid. R.* 63(7) and, in the unique circumstances in which they were made by one in the FBI's ~~prisoner~~ *witness* protection program, they do not qualify under *Evid. R.* 63(10).

FOR THE COURT

Theodore I. Botter, P.J.A.D.

The trial shall be stayed on Monday, March 12, 1984, until 1:00 p.m.

T. Botter, P.J.A.D.

WITNESS, THE HONORABLE , PRESIDING JUDGE OF PART , SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS DAY OF , 19 .

ELIZABETH McLAUGHLIN
CLERK OF THE APPELLATE DIVISION

UNITED STATES CONSTITUTION, Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

UNITED STATES CONSTITUTION,
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ORGANIZED CRIME CONTROL ACT OF 1970, Pub.L. No. 91-452, §§501-504, 84 Stat. 922 (1970) *repealed by* Witness Security Reform Act of 1984, 18 U.S.C. §§3521-28

Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.

Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

Sec. 503. As used in this title, "Government" means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof. The offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by any State or any

political subdivision, or any department, agency, or instrumentality thereof of the cost of maintaining and protecting such witnesses.

Sec. 504. There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title.

WITNESS SECURITY REFORM ACT OF 1984, 18 U.S.C. §§3521-28, Pub.L. No. 98-473, 98 Stat. 2153

§ 3521. Witness relocation and protection

(a)(1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.

(2) The Attorney General shall issue guidelines defining the types of cases for which the exercise of the authority of the Attorney General contained in paragraph (1) would be appropriate.

(3) The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

(b)(1) In connection with the protection under this chapter of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General shall take such action as the Attorney General determines to be necessary to protect the person involved from bodily injury and otherwise to assure the health, safety, and welfare of that person,

including the psychological well-being and social adjustment of that person, for as long as, in the judgment of the Attorney General, the danger to that person exists. The Attorney General may, by regulation—

(A) provide suitable documents to enable the person to establish a new identity or otherwise protect the person;

(B) provide housing for the person;

(C) provide for the transportation of household furniture and other personal property to a new residence of the person;

(D) provide to the person a payment to meet basic living expenses, in a sum established in accordance with regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

(E) assist the person in obtaining employment;

(F) provide other services necessary to assist the person in becoming self-sustaining;

(G) disclose or refuse to disclose the identity or location of the person relocated or protected, or any other matter concerning the person or the program after weighing the danger such a disclosure would pose to the person, the detriment it would cause to the general effectiveness of the program, and the benefit it would afford to the public or to the person seeking the disclosure, except that the Attorney General shall, upon the request of State or local law enforcement officials or pursuant to a court order, without undue delay, disclose to such officials the identity, location, criminal records, and fingerprints relating to the person relocated or protected when the Attorney General knows or the request indicates that the person is under investigation for or has been

arrested for or charged with an offense that is punishable by more than one year in prison or that is a crime of violence; and

(H) exempt procurement for services, materials, and supplies, and the renovation and construction of safe sites within existing buildings from other provisions of law as may be required to maintain the security of protective witnesses and the integrity of the Witness Security Program.

The Attorney General shall establish an accurate, efficient, and effective system of records concerning the criminal history of persons provided protection under this chapter in order to provide the information described in subparagraph.

(2) Deductions shall be made from any payment made to a person pursuant to paragraph (1)(D) to satisfy obligations of that person for family support payments pursuant to a State court order.

(3) Any person who, without the authorization of the Attorney General, knowingly discloses any information received from the Attorney General under paragraph (1)(G) shall be fined $5,000 or imprisoned five years, or both.

(c) Before providing protection to any person under this chapter, the Attorney General shall, to the extent practicable, obtain information relating to the suitability of the person for inclusion in the program, including the criminal history, if any, and a psychological evaluation of, the person. The Attorney General shall also make a written assessment in each case of the seriousness of the investigation or case in which the person's information or testimony has been or will be provided and the possible risk of danger to other persons and property in the community where the person is to be relocated and shall determine whether the need for that person's testimony outweighs the risk of danger to the public. In assessing whether a person should be provided protection under

this chapter, the Attorney General shall consider the person's criminal record, alternatives to providing protection under this chapter, the possibility of securing similar testimony from other sources, the need for protecting the person, the relative importance of the person's testimony, results of psychological examinations, whether providing such protection will substantially infringe upon the relationship between a child who would be relocated in connection with such protection and that child's parent who would not be so relocated, and such other factors as the Attorney General considers appropriate. The Attorney General shall not provide protection to any person under this chapter if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony. This subsection shall not be construed to authorize the disclosure of the written assessment made pursuant to this subsection.

(d)(1) Before providing protection to any person under this chapter, the Attorney General shall enter into a memorandum of understanding with that person. Each such memorandum of understanding shall set forth the responsibilities of that person, including—

(A) the agreement of the person, if a witness or potential witness, to testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings;

(B) the agreement of the person not to commit any crime;

(C) the agreement of the person to take all necessary steps to avoid detection by others of the facts concerning the protection provided to that person under this chapter;

(D) the agreement of the person to comply with legal obligations and civil judgments against that person;

(E) the agreement of the person to cooperate with all reasonable requests of officers and employees of the Government who are providing protection under this chapter;

(F) the agreement of the person to designate another person to act as agent for the service of process;

(G) the agreement of the person to make a sworn statement of all outstanding legal obligations, including obligations concerning child custody and visitation;

(H) the agreement of the person to disclose any probation or parole responsibilities, and if the person is on probation or parole under State law, to consent to Federal supervision in accordance with section 3522 of this title; and

(I) the agreement of the person to regularly inform the appropriate program official of the activities and current address of such person.

Each such memorandum of understanding shall also set forth the protection which the Attorney General has determined will be provided to the person under this chapter, and the procedures to be followed in the case of a breach of the memorandum of understanding, as such procedures are established by the Attorney General. Such procedures shall include a procedure for filing and resolution of grievances of persons provided protection under this chapter regarding the administration of the program. This procedure shall include the opportunity for resolution of a grievance by a person who was not involved in the case.

(2) The Attorney General shall enter into a separate memorandum of understanding pursuant to this subsection with each person protected under this chapter who is eighteen years of age or older. The memorandum of

understanding shall be signed by the Attorney General and the person protected.

(3) The Attorney General may delegate the responsibility initially to authorize protection under this chapter only to the Deputy Attorney General, to the Associate Attorney General, to the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, to the Assistant Attorney General in charge of Civil Rights Division of the Department of Justice (insofar as the delegation relates to a criminal civil rights case), and to one other officer or employee of the Department of Justice.

(e) If the Attorney General determines that harm to a person for whom protection may be provided under section 3521 of this title is imminent or that failure to provide immediate protection would otherwise seriously jeopardize an ongoing investigation, the Attorney General may provide temporary protection to such person under this Chapter before making the written assessment and determination required by subsection (c) of this section or entering into the memorandum of understanding required by subsection (d) of this section. In such a case the Attorney General shall make such assessment and determination and enter into such memorandum of understanding without undue delay after the protection is initiated.

(f) The Attorney General may terminate the protection provided under this chapter to any person who substantially breaches the memorandum of understanding entered into between the Attorney General and that person pursuant to subsection (d), or who provides false information concerning the memorandum of understanding or the circumstances pursuant to which the person was provided protection under this chapter, including information with respect to the nature and circumstances concerning child custody and visitation.

Before terminating such protection, the Attorney General shall send notice to the person involved of the termination of the protection provided under this chapter and the reasons for the termination. The decision of the Attorney General to terminate such protection shall not be subject to judicial review.

§3522. Probationers and parolees

(a) A probation officer may, upon the request of the Attorney General, supervise any person provided protection under this chapter who is on probation or parole under State law, if the State involved consents to such supervision. Any person so supervised shall be under Federal jurisdiction during the period of supervision and shall, during that period be subject to all laws of the United States which pertain to parolees.

(b) The failure by any person provided protection under this chapter who is supervised under subsection (a) to comply with the memorandum of undersanding entered into by that person pursuant to section 3521(d) of this title shall be grounds for the revocation of probation or parole, as the case may be.

(c) The United States Parole Commission and the Chairman of the Commission shall have the same powers and duties with respect to a probationer or parolee transferred from State supervision pursuant to this section as they have with respect to an offender convicted in a court of the United States and paroled under chapter 311 of this title. The provisions of sections 4201 through 4204, 4205(a), (e), and (h), 4206 through 4216, and 4218 of this title shall apply following a revocation of probation or parole under this section.

(d) If a person provided protection under this chapter who is on probation or parole and is supervised under subsection (a) of this section has been ordered by the State court which imposed sentence on the person to pay a sum of money to the victim of the offense involved for

damage caused by the offense, that penalty or award of damages may be enforced as though it were a civil judgment rendered by a United States district court. Proceedings to collect the moneys ordered to be paid may be instituted by the Attorney General in any United States district court. Moneys recovered pursuant to such proceedings shall be distributed to the victim.

§3523. Civil judgments

(a) If a person provided protection under this chapter is named as a defendant in a civil cause of action arising prior to or during the period in which the protection is provided, process in the civil proceeding may be served upon that person or an agent designated by that person for that purpose. The Attorney General shall make reasonable efforts to serve a copy of the process upon the person protected at the person's last known address. The Attorney General shall notify the plaintiff in the action whether such process has been served. If a judgment in such action is entered against that person the Attorney General shall determine whether the person has made reasonable efforts to comply with the judgment. The Attorney General shall take appropriate steps to urge the person to comply with the judgment. If the Attorney General determines that the person has not made reasonable efforts to comply with the judgment, the Attorney General may, after considering the danger to the person and upon the request of the person holding the judgment disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment. Any such disclosure of the identity and location of the person shall be made upon the express condition that further disclosure by the plaintiff of such identity or location may be made only if essential to the plaintiff's efforts to recover under the judgment, and only to such additional persons as is necessary to effect the recovery. Any such disclosure or nondisclosure by

the Attorney General shall not subject the United States and its officers or employees to any civil liability.

(b)(1) Any person who holds a judgment entered by a Federal or State court in his or her favor against a person provided protection under this chapter may, upon a decision by the Attorney General to deny disclosure of the current identity and location of such protected person, bring an action against the protected person in the United States district court in the district where the person holding the judgment (hereinafter in this subsection referred to as the "petitioner") resides. Such action shall be brought within one hundred and twenty days after the petitioner requested the Attorney General to disclose the identity and location of the protected person. The complaint in such action shall contain statements that the petitioner holds a valid judgment of a Federal or State court against a person provided protection under this chapter and that the petitioner sought to enforce the judgment by requesting the Attorney General to disclose the identity and location of the protected person.

(2) The petitioner in an action described in paragraph (1) shall notify the Attorney General of the action at the same time the action is brought. The Attorney General shall appear in the action and shall affirm or deny the statements in the complaint that the person against whom the judgment is allegedly held is provided protection under this chapter and that the petitioner requested the Attorney General to disclose the identity and location of the protected person for the purpose of enforcing the judgment.

(3) Upon a determination (A) that the petitioner holds a judgment entered by a Federal or State court and (B) that the Attorney General has declined to disclose to the petitioner the current identity and location of the protected person against whom the judgment was entered, the court shall appoint a guardian to act on behalf of the petitioner to enforce the judgment. The clerk of the court shall forthwith furnish the guardian with a copy of the

order of appointment. The Attorney General shall disclose to the guardian the current identity and location of the protected person and any other information necessary to enable the guardian to carry out his or her duties under this subsection.

(4) It is the duty of the guardian to proceed with all reasonable diligence and dispatch to enforce the rights of the petitioner under the judgment. The guardian shall, however, endeavor to carry out such enforcement duties in a manner that maximizes, to the extent practicable, the safety and security of the protected person. In no event shall the guardian disclose the new identity or location of the protected person without the permission of the Attorney General, except that such disclosure may be made to a Federal or State court in order to enforce the judgment. Any good faith disclosure made by the guardian in the performance of his or her duties under this subsection shall not create any civil liability against the United States or any of its officers or employees.

(5) Upon appointment, the guardian shall have the power to perform any act with respect to the judgment which the petitioner could perform, including the initiation of judicial enforcement actions in any Federal or State court or the assignment of such enforcement actions to a third party under applicable Federal or State law. The Federal Rules of Civil Procedure shall apply in any action brought under this subsection to enforce a Federal or State court judgment.

(6) The costs of any action brought under this subsection with respect to a judgment, including any enforcement action described in paragraph (5), and the compensation to be allowed to a guardian appointed in any such action shall be fixed by the court and shall be apportioned among the parties as follows: the petitioner shall be assessed in the amount the petitioner would have paid to collect on the judgment in an action not

arising under the provisions of this subsection; the protected person shall be assessed the costs which are normally charged to debtors in similar actions and any other costs which are incurred as a result of an action brought under this subsection. In the event that the costs and compensation to the guardian are not met by the petitioner or by the protected person, the court may, in its discretion, enter judgment against the United States for costs and fees reasonably incurred as a result of the action brought under this subsection.

(7) No officer or employee of the Department of Justice shall in any way impede the efforts of a guardian appointed under this subsection to enforce the judgment with respect to which the guardian was appointed.

(c) The provisions of this section shall not apply to a court order to which section 3524 of this title applies.

§ 3524. Child custody arrangements

(a) The Attorney General may not relocate any child in connection with protection provided to a person under this chapter if it appears that a person other than that protected person has legal custody of that child.

(b) Before protection is provided under this chapter to any person (1) who is a parent of a child of whom that person has custody, and (2) who has obligations to another parent of that child with respect to custody or visitation of that child under a court order, the Attorney General shall obtain and examine a copy of such order for the purpose of assuring that compliance with the order can be achieved. If compliance with a visitation order cannot be achieved, the Attorney General may provide protection under this chapter to the person only if the parent being relocated initiates legal action to modify the existing court order under subsection (e)(1) of this section. The parent being relocated must agree in writing before being provided protection to abide by any ensuing court orders issued as a result of an action to modify.

(c) With respect to any person provided protection under this chapter (1) who is the parent of a child who is relocated in connection with such protection and (2) who has obligations to another parent of that child with respect to custody or visitation of that child under a State court order, the Attorney General shall, as soon as practicable after the person and child are so relocated, notify in writing the child's parent who is not so relocated that the child has been provided protection under this chapter. The notification shall also include statements that the rights of the parent not so relocated to visitation or custody, or both, under the court shall not be infringed by the relocation of the child and the Department of Justice responsibility with respect thereto. The Department of Justice will pay all reasonable costs of transportation and security incurred in insuring that visitation can occur at a secure location as designated by the United States Marshals Service, but in no event shall it be obligated to pay such costs for visitation in excess of thirty days a year, or twelve in number a year. Additional visitation may be paid for, in the discretion of the Attorney General, by the Department of Justice in extraordinary circumstances. In the event that the unrelocated parent pays visitation costs, the Department of Justice may, in the discretion of the Attorney General, extend security arrangements associated with such visitation.

(d)(1) With respect to any person provided protection under this chapter (A) who is the parent of a child who is relocated in connection with such protection and (B) who has obligations to another parent of that child with respect to custody or visitation of that child under a court order, an action to modify that court order may be brought by any party to the court order in the District Court for the District of Columbia or in the district court for the district in which the child's parent resides who has not been relocated in connection with such protection.

(2) With respect to actions brought under paragraph (1), the district courts shall establish a procedure to provide a reasonable opportunity for the parties to the court order to mediate their dispute with respect to the order. The court shall provide a mediator for this purpose. If the dispute is mediated, the court shall issue an order in accordance with the resolution of the dispute.

(3) If, within sixty days after an action is brought under paragraph (1) to modify a court order, the dispute has not been mediated, any party to the court order may request arbitration of the dispute. In the case of such a request, the court shall appoint a master to act as arbitrator, who shall be experienced in domestic relations matters. Rule 53 of the Federal Rules of Civil Procedure shall apply to masters appointed under this paragraph. The court and the master shall, in determining the dispute, give substantial deference to the need for maintaining parent-child relationships, and any order issued by the court shall be in the best interests of the child. In actions to modify a court order brought under this subsection, the court and the master shall apply the law of the State in which the court order was issued or, in the case of the modification of a court issued by a district court under this section, the law of the State in which the parent resides who was not relocated in connection with the protection provided under this chapter. The costs to the Government of carrying out a court order may be considered in an action brought under this subsection to modify that court order but shall not outweigh the relative interests of the parties themselves and the child.

(4) Until a court order is modified under this subsection, all parties to that court order shall comply with their obligations under that court order subject to the limitations set forth in subsection (c) of this section.

(5) With respect to any person provided protection under this chapter who is the parent of a child who is relocated in connection with such protection, the parent not relocated in connection with such protection may

bring an action, in the District Court for the District of Columbia or in the district court for the district in which that parent resides, for violation by that protected person of a court order with respect to custody or visitation of that child. If the court finds that such a violation has occurred, the court may hold in contempt the protected person. Once held in contempt, the protected person shall have a maximum of sixty days, in the discretion of the Attorney General, to comply with the court order. If the protected person fails to comply with the order within the time specified by the Attorney General, the Attorney General shall disclose the new identity and address of the protected person to the other parent and terminate any financial assistance to the protected person unless otherwise directed by the court.

(6) The United States shall be required by the court to pay litigation costs, including reasonable attorneys' fees, incurred by a parent who prevails in enforcing a custody or visitation order; but shall retain the right to recover such costs from the protected person.

(e)(1) In any case in which the Attorney General determines that, as a result of the relocation of a person and a child of whom that person is a parent in connection with protection provided under this chapter, the implementation of a court order with respect to custody or visitation of that child would be substantially impossible, the Attorney General may bring, on behalf of the person provided protection under this chapter, an action to modify the court order. Such action may be brought in the district court for the district in which the parent resides who would not be or was not relocated in connection with the protection provided under this chapter. In an action brought under this paragraph, if the Attorney General establishes, by clear and convincing evidence, that implementation of the court order involved would be substantially impossible, the court may modify the court order but shall, subject to appropriate security considerations, provide an alternative as substantially equivalent

to the original rights of the nonrelocating parant as feasible under the circumstances.

(2) With respect to any State court order in effect to which this section applies, and with respect to any district court order in effect which is issued under this section, if the parent who is not relocated in connection with protection provided under this chapter intentionally violates a reasonable security requirement imposed by the Attorney General with respect to the implementation of that court order, the Attorney General may bring an action in the district court for the district in which that parent resides to modify the court order. The court may modify the court order if the court finds such an intentional violation.

(3) The procedures for mediation and arbitration provided under subsection (d) of this section shall not apply to actions for modification brought under this subsection.

(f) In any case in which a person provided protection under this chapter is the parent of a child of whom that person has custody and has obligations to another parent of that child concerning custody and visitation of that child which are not imposed by court order, that person, or the parent not relocated in connection with such protection, may bring an action in the district court of the district in which that parent not relocated resides to obtain an order providing for custody or visitation, or both, of that child. In any such action, all the provisions of subsection (d) of this section shall apply.

(g) In any case in which an action under this section involves court orders from different States with respect to custody or visitation of the same child, the court shall resolve any conflicts by applying the rules of conflict of laws of the State in which the court is sitting.

(h)(1) Subject to paragraph (2), the costs of any action described in subsection (d), (e), or (f) of this section shall be paid by the United States.

(2) The Attorney General shall insure that any State court order in effect to which this section applies and any district court order in effect which is issued under this section are carried out. The Department of Justice shall pay all costs and fees described in subsections (c) and (d) of this section.

(i) As used in this section, the term "parent" includes any person who stands in the place of a parent by law.

§3525. Victims Compensation Fund

(a) The Attorney General may pay restitution to, or in the case of death, compensation for the death of any victim of a crime that causes or threatens death or serious bodily injury and that is committed by any person during a period in which that person is provided protection under this chapter.

(b) Not later than four months after the end of each fiscal year, the Attorney General shall transmit to the Congress a detailed report on payments made under this section for such year.

(c) There are authorized to be appropriated for the fiscal year 1985 and for each fiscal year thereafter, $1,000,000 for payments under this section.

(d) The Attorney General shall establish guidelines and procedures for making payments under this section. The payments to victims under this section shall be made for the types of expenses provided for in section 3579(b) of this title, except that in the case of the death of the victim, an amount not to exceed $50,000 may be paid to the victim's estate. No payment may be made under this section to a victim unless the victim has sought restitution and compensation provided under Federal or State law or by civil action. Such payments may be made only to the extent the victim, or the victim's estate, has not otherwise received restitution and compensation, including insurance payments, for the crime

involved. Payments may be made under this section to victims of crimes occurring on or after the date of the enactment of this chapter. In the case of a crime occurring before the date of the enactment of this chapter, a payment may be made under this section only in the case of the death of the victim, and then only in an amount not exceeding $25,000, and such a payment may be made notwithstanding the requirements of the third sentence of this subsection.

(e) Nothing in this section shall be construed to create a cause of action against the United States.

§3526. Cooperation of other Federal agencies and State governments; reimbursement of expenses

(a) Each Federal agency shall cooperate with the Attorney General in carrying out the provisions of this chapter and may provide, on a reimbursable basis, such personnel and services as the Attorney General may request in carrying out those provisions.

(b) In any case in which a State government requests the Attorney General to provide protection to any person under this chapter—

> **(1)** the Attorney General may enter into an agreement with that State government in which that government agrees to reimburse the United States for expenses incurred in providing protection to that person under this chapter; and
>
> **(2)** the Attorney General shall enter into an agreement with that State government in which that government agrees to cooperate with the Attorney General in carrying out the provisions of this chapter with respect to all persons.

§3527. Additional authority of Attorney General

The Attorney General may enter into such contracts or other agreements as may be necessary to carry out this

chapter. Any such contract or agreement which would result in the United States being obligated to make outlays may be entered into only to the extent and in such amount as may be provided in advance in an appropriation Act.

§3528. Definition

For purposes of this chapter, the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

WITNESS PROTECTION PROGRAM: HEARINGS BEFORE THE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 95TH CONG., 2d SESS. (1978)

[Exhibit 29]

MEMORANDUM OF UNDERSTANDING

SENSITIVE INVESTIGATIVE MATERIAL

WITNESS SECURITY PROGRAM

UNITED STATES MARSHALS SERVICE

MEMORANDUM OF UNDERSTANDING

Distribution:
Original Copy — METRO
One Copy — Originating Witness
Security Specialist
(Do not give copy to witness)

SENSITIVE INVESTIGATIVE MATERIAL

Revised 7/12/77

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MEMORANDUM OF UNDERSTANDING

INTRODUCTION — Under Title V of Public Law 91-452, the purpose of the Witness Protection Program is to provide for the security of Government witnesses and potential Government witnesses, and members of their families whose life or person is placed in danger by virtue of being a witness or intended witness in legal proceedings against any person alleged to have participated in an organized criminal activity. Protection and maintenance are not provided in return for testimony. This memorandum is not a contract or an agreement to provide protection or maintenance in return for testimony. This is not a contract for employment between the witness and the Government, nor a contract to secure employment. Participation in the Witness Protection Program is purely voluntary and a witness may terminate participation in the Program at any time. Moreover, since it is within the Attorney General's discretion to approve participation in the Program, the witness may be terminated from the Program when the Attorney General determines that the life or person of the witness is no longer in danger, or for other reasons deemed appropriate by the Attorney General or his representative.

This memorandum sets out the assistance which will be provided by the United States Marshals Service under the Witness Protection Program as well as the obligations of the protected witness. This memorandum and it's appendices, encompass all of the assistance which will be provided. Assistance not specifically contained herein, will not be provided by the United States Marshals Service, except as may be amended in writing. Investigative agents and government attorneys are not

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authorized to make representations concerning assistance which will be provided in effecting protection and relocation. Any representations made by such investigative agents or attorneys, which are outside those expressly prescribed herein, are made without authority and will not be honored by the United States Marshals Service. State all promises or agreements which have been made by investigative agents or government attorneys, concerning the Witness Protection Program.

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Once designated by the Attorney General or his representative, protection of a government witness becomes the responsibility of the United States Marshals Service.

The security of each witness depends on the witness' cooperation as well as the cooperation of family members. Willful acts on the part of the witness or family members, which jeopardizes the witness' security, *WILL BE GROUNDS FOR TERMINATION* from the Witness Security Program since the Marshals Service will be unable to provide adequate protection. Such actions as returning to the danger area without United States Marshals Service protection or against instructions of United States Marshals Service personnel, and involvement in criminal activity will result in *IMMEDIATE TERMINATION* from the Witness Protection Program. Likewise, the United States Marshals Service *WILL NOT SHIELD* witnesses from civil or criminal litigation initiated prior to or subsequent to entry into the Program.

Government protected witnesses *WILL NOT* act as undercover informants or in other witness roles without

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the prior approval of the Assistant Attorney General who authorized their admission into the Witness Protection Program. If authorization is not received then the witness will be terminated.

When assistance has been provided to the extent that the witness' life or person is no longer in danger subsistence may be discontinued. It is, therefore, imperative that witnesses begin vigorously seeking employment as soon as possible. Security assistance is continuing in nature and future security problems should be brought to the attention of the United States Marshals Service for evaluation.

The attached documents must be read and completed.

A. SECURITY ASSISTANCE

1. The United States Marshals Service is authorized to make all decisions concerning security assistance. Unless deemed appropriate by the Marshals Service, a witness will not be protected at his/her pick-up location and the witness must be willing to relocate immediately. The relocation is necessary since the danger at the pick-up location may present serious security risks.

2. When deemed necessary by the Marshals Service, personal security will be furnished to the witness on a 24-hour basis when it is necessary for him or her to return to the place of danger to testify in court or converse with government attorneys in connection with preparation for trial, or at any other time when deemed necessary by the United States Marshals Service. Security will begin upon the witness' arrival in danger area.

3. The Bureau of Prisons will normally determine where prisoner-witnesses will be housed.

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B. DOCUMENTATION ASSISTANCE

1. *ONLY* new documentation which is in the opinion of the United States Marshals Service, *ESSENTIAL FOR THE WITNESS' SECURITY*, will be provided. Fictitious or false records will not be provided and documentation will reflect only factual information. Bank references or credit histories *WILL NOT BE PROVIDED.* Certain verified information which is in the possession of the United States Marshals Service, may be provided after security considerations have been made. Special documentation needs must be brought immediately to the attention of the United States Marshals Service for their consideration.

2. The United States Marshals Service, by providing any documentation which reflects a new identity, has done so only for the witness' protection and security.

3. This documentation *WILL NOT* be used for fraudulent purposes and any obligations which may be incurred by utilizing this documentation are liabilities of the witness and not those of the U.S. Government.

C. RELOCATION ASSISTANCE

1. After authorization has been received, a witness will be relocated immediately from the danger area to an area determined by the United States Marshals Service. Normally, a witness is located to a temporary site for a short period of time, and may then be relocated to a second temporary site until the trial has ended. If permanent relocation is necessary, only one permanent relocation will be made at government expense. Subsequent permanent relocations will be at the witness' expense, unless the United States Marshals Service

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determines that the relocation is necessary for security reasons.

2. The relocation of household goods will be made by commercial moving establishments selected by the United States Marshals Service. It should be noted that our prior experience indicates that commercial movers frequently damage furniture. It should be noted that *the United States Marshals Service assumes no responsibility for damage or loss which may occur through the movement of household goods by commercial movers.* Any claims for such loss or damage must be made by the witness with the commercial mover. The United States Marshals Service will provide assistance in forwarding the claim to the commercial mover in order to protect the witness' identity and location to the extent consistent with maintaining the witness' identity and location secret. The United States Marshals Service will pay for the movement of household goods.

3. Jewelry, monies (gold, silver, or currency), coin or stamp collections are not covered for insurance purposes by commercial movers. The witness must carry these items to the area of relocation. Consideration should also be given to carrying other items of extraordinary value.

4. Relocation of the witness (and family members, if applicable), will be by a mode selected by the United States Marshals Service.

5. Family members of prisoner-witnesses will not be relocated unless deemed necessary by the Assistant Attorney General. Such relocation may not necessarily be to the area where the prisoner-witness may be located.

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D. SUBSISTENCE ASSISTANCE

1. The United States Marshals Service has sole authority to arrange for the maintenance of protected witnesses and their family and/or household members.

2. The subsistence to be provided is determined by family size and geographic area, and is based on Bureau of Labor Statistics tables. Witnesses who are determined by the United States Marshals Service to be able to support themselves and their families, *WILL NOT* be furnished subsistence. Witnesses must immediately notify the United States Marshals Service of income received by them, household members, or held for their account. Witnesses may not receive both subsistence under the Witness Protection Program and statutory witness fees.

3. The United States Marshals Service will assist relocated witnesses in obtaining housing in the new area. Rents shall be paid from subsistence allocated in Paragraph 2, above. Rents will be consistent with funds available based on Bureau of Labor Statistics tables. The housing may be in the form of detached homes, apartments, motel or hotel rooms, and may be located on government installations.

4. The United States Marshals Service will not purchase houses or other real property for witnesses nor will it act as a surety or guarantor for the purchase of such property.

5. The witness (and family, if applicable) will be eligible for emergency or major medical treatment at Public Health Service facilities during the time they receive subsistence. Arrangements for normal or routine medical treatment will be arranged by the local United States Marshal through private facilities. No cosmetic medical treatment is authorized.

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6. Family members of prisoner-witnesses who are not relocated *WILL NOT* normally receive subsistence, since their ability to work is in no way restricted.

E. DEBTS AND RELATED LEGAL MATTERS

1. Attachment V. reflects all debts incurred by the witness or member of the witness' household. Arrangements must be made with creditors immediately, to settle all debts. Failure to do so will jeopardize participation in the Witness Protection Program since *the United States Marshals Service WILL NOT SHIELD witnesses from legitimate creditors*. Failure to settle debts may result in the disclosure of location to creditors. Additionally, creditors may resort to private investigators whose activities will seriously jeopardize the witness' security. In addition to debts, witnesses must list all property, personal or real, on which there is presently a lien, and the name of the person or entity holding such lien.

2. Witnesses may appoint private counsel to settle debts in their behalf. Payment of private counsel is the sole responsibility of the witness, and the United States Marshals Service assumes no responsibility for payment of private counsel. Witnesses may appoint private counsel to receive service of process in their behalf. If private counsel is not appointed, the witness hereby designates the General Counsel, United States Marshals Service, to receive and forward all process to the witness. The witness must then take those steps necessary to respond to said process. The United States Marshals Service will neither represent nor pay for private counsel to represent a witness' interest in such matters. No agency relationship of any kind is created by this Memorandum between the witness, members of his/her family, or any

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officer or employee of the United States Marshals Service. Under no circumstances will the General Counsel, United States Marshals Service, act as an agent for service of process for a witness or any member of his/her family. It is the responsibility of the witness to arrange for an agent to conclude *ALL BUSINESS ARRANGEMENTS*, such as the sale of a residence or business, prior to entering the Witness Protection Program. The United States Marshals Service assumes no responsibility for expenses incurred in concluding these arrangements.

3. All court orders which are directed to the witness must be immediately brought to the attention of the United States Marshals Service. Court orders which grant custody of minor children to persons other than a witness who is being relocated, will be honored and said minor children *WILL NOT* be relocated in violation of the court order. It is the responsibility of the witness to comply with or have amended or vacated, orders directing the payment of child support or alimony. Otherwise the United States Marshals Service may be compelled to pay these amounts from the witness' subsistence.

4. Should there be a dissolution of the witness' family structure, no element of the family will be provided subsistence above that described herein.

F. EMPLOYMENT AND TERMINATION FROM SUBSISTENCE

1. Acquisition of gainful employment is the responsibility of the protected witness. *EACH WITNESS IS EXPECTED TO ACQUIRE EMPLOYMENT WITHIN SIXTY (60) DAYS FOLLOWING HIS OR HER PERMANENT RELOCATION*. The United States Marshals Service will

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assist the witness in attempting to locate one job opportunity. The United States Marshals Service can give no assurance that a job opportunity which may be located, will be equal to the witness' last job in either type, prestige, or pay. If a job opportunity is secured, however, the witness is expected to accept the job. If the witness fails to accept this job opportunity, he or she will be terminated from subsistence.

2. Immediately after permanent relocation, the witness must begin actively seeking employment. While resumes or background histories will not be prepared by the United States Marshals Service, witnesses who need their employment backgrounds vertified must contact the United States Marshals Service, who will advise the employer of the witness' background and criminal record, if any. The witness *WILL NOT* represent that he or she is an employee or consultant of the United States Marshals Service or any other government agency. False information will not be provided to potential employers. 18 U.S. Code, Section 912, provides for a fine of not more than $1,000 or imprisonment for not more than three (3) years, or both, for anyone who assumes or pretends to be an officer or employee of the United States and demands or obtains money or any other thing of value.

3. Family members of prisoner/witnesses who are not relocated will not normally receive subsistence, since their ability to work is in no way restricted. Relocated family members of witnesses who receive jail sentences and are incarcerated will be terminated from subsistence sixty (60) days after the witness goes to jail and the provision of (1) above will apply.

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G. MAIL FORWARDING SERVICES

A. The witness acknowledges that the United States Marshals Service will only provide mail forwarding services for a period not to exceed one year after his/her last trial appearance.

B. The witness agrees to complete a "Change of Address Order" changing his/her mailing address to a Post Office Box Number used by the United States Marshals Service. The witness acknowledges that forwarding service will only be provided for letters or other written material contained in an *envelope*.

C. The witness acknowledges the necessity to terminate correspondence, where possible, with persons known prior to entry into the Witness Security Program for reasons of security.

D. The witness agrees to present all mail addressed to correspondents having knowledge of his/her identity prior to entry into the Witness Security Program to the United States Marshals Service for forwarding to insure confidentiality of his/her new identity and address.

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I. MOVEMENT OF HOUSEHOLD GOODS

A. The witness acknowledges that his or her household goods will be relocated only one time at government expense, unless otherwise determined to be necessary by the United States Marshals Service. Household goods will be relocated:

From_____

If the final relocation site is unknown, then household goods will be placed in temporary storage. If the witness desires to assume responsibility for placing household goods in long-term storage, then the cost of movement to permanent relocation site will be borne by the witness. The United States Marshals Service will handle security arrangements only.

B. The witness acknowledges that the move will be made by a commercial moving establishment and the United States Marshals Service assumes no responsibility for the handling and care given those goods by the moving establishment.

C. The witness acknowledges that any and all claims for loss or damage to household goods must be made with the moving establishment. These claims will be submitted through the U.S. Marshals Service in order to protect the witness' identity and location.

D. The witness acknowledges that jewelry, monies (gold, silver or currency), coin or stamp collections are not covered for insurance purposes and *SHOULD NOT*, therefore, be shipped with household goods. Likewise, the witness understands the risks involved in shipping other items of extraordinary value with household goods.

E. The witness acknowledges that household goods placed in storage by the United States Marshals Service and remaining in storage at the time the witness is terminated from allowances by the United States Marshals Service will cease to be the responsibility of the United States Marshals Service sixty (60) days following

date of termination. The witness shall provide an address for delivery of household goods within sixty (60) days, or assume responsibility for payment of storage and subsequent delivery costs thereafter.

By: _____
U.S. Marshals Service

Date: _____

_____
Witness' Signature

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Signature of adult family member(s)

Date: _____

II. MOVEMENT OF WITNESS AND/OR FAMILY MEMBER

A. The witness acknowledges that he or she and family members will relocate by the following means, as determined by the U.S. Marshals Service.

_____

(LIST MEANS USED SUCH AS COMMON CARRIER OR PRIVATELY OWNED VEHICLE)
Number of family members being relocated .

B. The witness acknowledges that the U.S. Marshals Service will pay the cost of common carrier transportation if used, or pay cents per mile if movement is by privately owned vehicle. Motor vehicles with outstanding liens *WILL NOT* be moved out of state.

C. The witness acknowledges that before the U.S. Marshals Service will reimburse him or her for costs of food and lodging during such move, receipts must be presented to the U.S. Marshals Service. This reimbursement will be an account not to exceed $_____ per day.

D. The witness acknowledges that travel between the relocated area and the place of trial, which is at the request of government attorneys, will be paid for by the U.S. Marshals Service. The mode of travel will be that selected by the U.S. Marshals Service. Before the U.S. Marshals Service will reimburse a witness for costs of food and lodging which may be incurred during such travel, receipts must be presented to the U.S. Marshals Service. This reimbursement will be an amount not to exceed $_____ per day.

WITNESSES HAVING FUNDS FROM OTHER SOURCES MAY NOT RECEIVE SUCH REIMBURSEMENT.

By:_____
U.S. Marshals Service

Date:_____

_____
Witness' Signature

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Signature of adult family member(s)

Date:_____

III. PETS

A. Care and feeding of pets is the responsibility of the witness and *NOT* the United States Marshals Service. Costs for boarding pets will be borne by the witness and witnesses must make such payment from their monthly subsistence.

B. The witness acknowledges that the United States Marshals Service will pay for the movement of pets as long as such movement can be accomplished by ordinary commercial means, such as by regularly scheduled aircraft, trains, etc. The United States Marshals Service assumes *NO* responsibility for the care and treatment of such pets while being transported.

Initials of Adult Family Members

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IV. STATEMENT OF OTHER SOURCES OF INCOME

The witness acknowledges that he or she must provide the United States Marshals Service with information concerning all sources of income received by them, household members, or held for their account.

AMOUNT OF INCOME	SOURCE	DATE RECEIVED OR ANTICIPATED

The witness acknowledges that information concerning other sources of income may determine the amount of subsistence which will be paid by the United States Marshals Service. Failure to provide this information or providing false information, may subject the witness to Federal criminal penalties under 18 U.S.C. 641.

By:_____
U.S. Marshals Service

Date:_____

_____
Witness Signature

_____
Signature of adult family member(s)

Date:_____

V. SUBSISTENCE PAYMENTS

A. The witness acknowledges that subsistence payments may be at a daily or monthly rate and the amount thereof will be determined from Bureau of Labor statistics tables. The method of payment will be determined by the United States Marshals Service.

B. The witness acknowledges that subsistence payments may end sixty (60) days after permanent relocation or upon obtaining employment.

C. The witness acknowledges that subsistence payments may be terminated sooner for reasons stated in the attached Memorandum of Understanding.

D. The witness further acknowledges that he/she must confine spending to the amounts of subsistence authorized and received through the United States Marshals Service.

By:_____
U.S. Marshals Service

Date:_____

_____
Witness' Signature

_____
Signature of adult family member(s)

Date:_____

VI. OUTSTANDING DEBTS/LIENS

A. The witness acknowledges that the following debts are presently outstanding.

CREDITOR	BALANCE OWED

B. The witness acknowledges that outstanding liens exist on the following goods.

DESCRIPTION OF GOODS	LIENHOLDER	ADDRESS

Have you ever filed for bankruptcy?
If so, give name of court, location, and status of the proceeding.

By:_____
U.S. Marshals Service

Date:_____

_____
Witness Signature

_____
Signature of adult family member(s)

_____
Date

VII. OUTSTANDING COURT ORDERS AND APPOINTMENT OF PRIVATE COUNSEL

A. The witness acknowledges that the following court orders exist which direct him or her to perform the following acts.

COURT	ACTIONS DIRECTED	DATE

B. The witness acknowledges that he or she has appointed the below named person to receive service of process and act in his or her behalf in all matters, and that this person has been so notified and retained. THE WITNESS CONSENTS TO THE PERSONAL JURISDICTION OF ANY COURT IN WHICH A CIVIL ACTION MAY BE BROUGHT AGAINST HIM OR HER.

NAME	ADDRESS

C. The witness acknowledges that if private counsel is not appointed to receive service of process, the General Counsel, U.S. Marshals Service will receive and forward all process to him or her. The witness must then take those steps necessary to respond to said process. The Marshals Service will neither represent nor pay for private counsel to represent a witness' interest in such matters.

By:_____
U.S. Marshals Service

Date:_____

_____
Witness Signature

_____
Signature of adult family member(s)

_____
Date

VIII. RELEASE OF MEDICAL RECORDS

I DO HEREBY REQUEST THAT DR. _____
(Doctor's Name)

_____, _____,
(Street Address) (City)

_____, RELEASE TO A
(State and Zip Code)

REPRESENTATIVE OF THE UNITED STATES MARSHALS SERVICE (UPON PROPER IDENTIFICATION) A COPY OF ANY AND ALL MEDICAL RECORDS IN HIS/HER POSSESSION PERTAINING TO MY FAMILY AND MYSELF.

_____
(Signature)

_____
(Date)

NOTE: The witness shall complete this document and leave it in the package. Separate forms are to be completed for each doctor concerned.

IX. RELEASE OF SCHOOL RECORDS

I DO HEREBY AUTHORIZE AND REQUEST THAT_____
(School)

_____
(Location)

RELEASE TO A REPRESENTATIVE OF THE UNITED STATES MARSHALS SERVICE (UPON PROPER IDENTIFICATION) SCHOOL RECORDS PERTAINING TO MY CHILD_____.

_____
(Signature of Parent or Guardian)

_____
(Date)

NOTE: The witness shall complete this document and leave it in the package. Separate school releases are required for each child and school involved.

X. RELEASE FOR SOCIAL SECURITY INFORMATION

I DO HEREBY AUTHORIZE THE SOCIAL SECURITY ADMINISTRATION TO RELEASE ANY AND ALL INFORMATION REGARDING MY SOCIAL SECURITY APPLICATION TO THE UNITED STATES MARSHALS SERVICE.

ON MY BEHALF, I AUTHORIZE THE UNITED STATES MARSHALS SERVICE TO PROCESS, THROUGH THE SOCIAL SECURITY ADMINISTRATION, ALL LEGAL CLAIMS AND BENEFITS TO WHICH I AM ENTITLED.

_____

(Applicant's Signature (New Name)

_____

(Date)

Old Social Security Number:_____

NOTE: The witness and each family member shall complete this document and leave it in the package. The witness and each family member shall also complete an "Application for a Social Security Number" (Form SS-5) and attach to this package as described in USM Order on "Revised Identity."

If the witness or any member of his family cannot remember his old number, or if a member of the family is over 10 years of age and states that he has never had a Social Security number, provide on a separate piece of paper: True name, place of birth, mother's true maiden name, and father's true name.

XI. REVISED IDENTITY AGREEMENT

"THE UNDERSIGNED_____ HEREBY ACKNOWLEDGES THAT THE DEPARTMENT OF JUSTICE, BY PROVIDING ME WITH ANY DOCUMENTATION WHICH REFLECTS A NEW IDENTITY, HAS DONE SO ONLY FOR MY PROTECTION AND SAFEKEEPING. I UNDERSTAND THAT THIS DOCUMENTATION MAY NOT BE USED FOR MY OWN PERSONAL GAIN AND THAT ANY OBLIGATIONS WHICH I INCUR BY UTILIZING THIS DOCUMENTATION ARE MY LIABILITIES AND NOT THOSE OF THE UNITED STATES GOVERNMENT. I FURTHER UNDERSTAND THAT THESE DOCUMENTS REMAIN THE PROPERTY OF THE UNITED STATES GOVERNMENT AND MUST BE SURRENDERED AT ITS REQUEST. SUCH RETURN REQUEST WOULD BE PREDICATED UPON MY MISUSE OF THESE DOCUMENTS FRAUDULENTLY OR FOR PERSONAL GAIN."

_____
(Signature of Witness)

_____
(Signature of Adult Family Members)

_____

_____

By:_____ _____
(U.S. Marshals Service) (Date)

_____
(Date)

XII. REQUEST FOR COURT-ORDERED NAME CHANGE

I DO HEREBY REQUEST THAT THE UNITED STATES MARSHALS SERVICE OBTAIN FOR ME AND MY FAMILY A COURT-ORDERED NAME CHANGE.

(True Name)	(New Name)	(DOB)
(True Name)	(New Name)	(DOB)
(True Name)	(New Name)	(DOB)
(True Name)	(New Name)	(DOB)
(True Name)	(New Name)	(DOB)

(USE FULL NAMES, NO INITIALS)

(Signature of Witness)

(Signature of Adult Family Members)

By: (U.S. Marshals Service)

Date:

NOTE: Upon receipt of this form at METRO, a decision will be made on whether a name change is required. If deemed appropriate, a formal petition will be prepared and returned for additional signatures. It is important that this form be filled out and returned to METRO as soon as possible.

XIII. SUMMARY

The witness acknowledges having read and understood the foregoing Memorandum of Understanding and accompanying Subsections consisting of twenty (20) pages. All provisions of the Witness Security Program are contained in the foregoing twenty (20) pages. A copy of this Memorandum is not being furnished the witness for security reasons. However, this document may be reviewed by contacting the United States Marshals Service. No amendment to this Agreement is effective and binding unless approved by the Chief, Witness Security Division, and Legal Counsel, United States Marshals Service.

_____
(Signature of Witness)

_____
(Signature of Adult Family Members)

_____

_____

_____
(Date)

By:_____
(U.S. Marshals Service)

Date:_____

NEW JERSEY RULES OF EVIDENCE

RULE 63(10). DECLARATIONS AGAINST INTEREST

A statement is admissible if at the time it was made it was so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, except that such a statement is not admissible against a defendant other than the declarant in a criminal prosecution.

Supreme Court, U.S.
FILED
NOV 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-678

In The
Supreme Court of the United States
October Term, 1985

—o—

UNITED PACIFIC INSURANCE CO.
and ORLANDO-ANASTASI JOINT VENTURE,
Petitioners,

v.

ANIERO CONCRETE CO., INC.,
Respondent.

—o—

RESPONSE IN OPPOSITION TO PETITION OF UNITED PACIFIC INSURANCE CO. AND ORLANDO-ANASTASI JOINT VENTURE FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

—o—

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No. 85-678

—o—

In The

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UNITED PACIFIC INSURANCE CO.
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—o—

RESPONSE IN OPPOSITION TO PETITION OF UNITED PACIFIC INSURANCE CO. AND ORLANDO-ANASTASI JOINT VENTURE FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

—o—

COUNTERSTATEMENT OF THE CASE

This case involves a suit by plaintiff-respondent, Aniero Concrete Co., Inc. ("Aniero"), a concrete subcontractor, against defendant-petitioner, Orlando-Anastasi Joint Venture ("Orlando-Anastasi"), a general contractor, and its bonding company, defendant-petitioner, United Pacific Insurance Co. ("United Pacific"), for monies due Aniero for work performed under a Subcontract with Orlando-

Anastasi and for extra work performed by Aniero for the general contractor. On March 9, 1984, during the presentation of petitioners' case, the petitioners sought to present Ms. Susan Carrochi ("Carrochi"), the legal assistant of defendant's trial counsel, Edward M. Dunham, Jr., Esq., as a witness. Carrochi's testimony was to be a recital of statements which she allegedly heard Rudolph Orlandini[1] make in two (2) trial-preparation interviews conducted by Edward M. Dunham, Jr., Esq., as trial attorney for petitioners. The Trial Court ruled that the testimony of Carrochi was admissible under New Jersey Evidence Rules 63(7) (R1a)[2] and 63(10) (59a)[3].

Immediately following the Trial Court's ruling on the admissibility of the Carrochi testimony, respondent sought leave to file an interlocutory appeal with the New Jersey Superior Court, Appellate Division. The Appellate Division granted respondent's application for leave to file an interlocutory appeal, and reversed the Trial Court's ruling admitting the testimony of Carrochi. The Appellate Division's ruling is contained in an Order (7a-8a) entered on March 9, 1984. In reversing the Trial Court's ruling, cer-

---

[1]Rudolph Orlandini was a named defendant, along with the petitioners. In addition, Rudolph Orlandini was a principal of Orlando Construction Co., Inc., another named defendant, and one of the two corporations forming the Orlando-Anastasi Joint Venture. The other half of the joint venture was Anastasi Brothers Corporation, which was also named defendant. The principal of Anastasi Brothers Corporation is Joseph S. Anastasi, who was likewise named a defendant in this matter.

[2]R1a indicates reference to respondent's Appendix Page 1a.

[3]59a refers to petitioner's Appendix Page 59a. Further references to petitioner's Appendix and respondent's Appendix will be distinguished by the use of "R" in front of the page number when referring to respondent's Appendix.

tain factual information was presented to the Appellate Division and was considered by it in connection with its analysis of the issues. This factual information was admitted by the petitioners and is summarized as follows:

1. That on June 26 and November 5, 1983, petitioners' counsel, Edward W. Dunham, Jr., conducted trial preparation interviews of Orlandini, an individual enrolled in the Federal Witness Protection Program.

2. That the first interview of Orlandini was attended by Mr. Dunham, Ms. Carrochi, a legal assistant employed by Mr. Dunham, and by Joseph Anastasi, Mr. Dunham's client, one of the named defendants in this action.

3. That Joseph Anastasi was a principal of Anastasi Brothers Corporation, one of the two corporations forming the joint venture, Orlando-Anastasi.

4. That the out-of-Court declarant, Orlandini, was a principal of Orlando Construction Company, the other corporation forming the joint venture, Orlando-Anastasi.

5. That the second interview of Orlandini was attended by Mr. Dunham, Ms. Crarochi and David G. White, Esq., New Jersey counsel for petitioners.

6. That petitioners sought to have Carrochi testify at the trial concerning statements heard by her during the course of the two (2) trial preparation interviews conducted by Mr. Dunham.

7. That there were no stenographic, sound or video recordings made of the interviews with Orlandini.

8. That Orlandini was not placed under oath during either of the interviews.

9. That the interviews of Orlandini were conducted by Mr. Dunham, petitioners' trial counsel, and that respondent's counsel were not present at either of these interviews.

10. That the out-of-court declarant, Orlandini, is a party defendant in this action.

11. That at the time that Orlandini was interviewed, there was no crossclaim filed against Orlandini by any of the other defendants.

12. That Orlandini's deposition was taken in connection with this matter and would be read to the jury as part of petitioners' case.

13. That Carrochi had no personal knowledge of any of the facts relating to the matters at issue in the litigation.

The Order entered by the Appellate Division provided petitioners with an opportunity to move before the Supreme Court of New Jersey in an attempt to have the Appellate Division's interlocutory ruling overturned. Defendants took advantage of this proviso in the Order and on March 12, 1984, submitted a Motion for Leave to Appeal to the New Jersey Supreme Court. Petitioners' Motion for Leave to Appeal was presented to the entire New Jersey Supreme Court on March 13, 1984. On that date, the New Jersey Supreme Court denied petitioners' Motion for Leave to Appeal. An Order embodying the New Jersey Supreme Court's ruling was entered on March 13, 1984 (R2a).

On March 15, 1984, the jury returned a unanimous verdict in favor of respondent and against petitioners awarding respondent its entire claim.

Following the entry of judgment, respondent appealed from the Trial Court's ruling on the question of prejudgment interest. Petitioners cross appealed. On May 6, 1985, the Appellate Division delivered its written decision (1a) wherein, *inter alia*, it affirmed its interlocutory ruling that the statements of Orlandini to be recited by Carrochi were not admissible under New Jersey Evidence Rule 63(10).

United Pacific and Orlando Anastasi filed a Petition for Certification with the New Jersey Supreme Court on June 28, 1985. By Order dated July 23, 1985 (6a), petitioners' Petition for Certification was denied.

ARGUMENT

A.

THE QUESTION PRESENTED BY PETITIONERS WAS NOT RAISED IN OR DECIDED BY THE APPELLATE DIVISION AND THEREFORE THE APPELLATE DIVISION'S DECISION SHOULD NOT BE REVIEWED BY THIS COURT.

The question presented to this Court for review was never presented to the Appellate Division. The entire argument advanced by petitioners before the Appellate Division is contained in Point III, Subpoint B of the Brief filed upon behalf of petitioners in the Appellate Division proceedings (R3a-R7a).

In their Appellate Division Brief, petitioners made the following argument:

> As set forth above, when this Court reversed the decision of the Trial Court, it apparently relied on its perception of the scope of immunity, if any, from civil and criminal prosecution granted Orlandini in the Witness Protection Program. This perception could only have been based on what the Court thought it knew about the program. It most certainly was not based on the record as there was no evidence whatsoever before the Trial Court as to the terms and conditions of Orlandini's agreement with the government. (R5a).

The petitioners then went on to argue:

> Inasmuch as it was Aniero that sought the *in limine* ruling from the Trial Court as to the admissibility of Carrochi's testimony, it was Aniero's burden to show that *Evid. R.* 63(10) exception to the hearsay rule did not apply. Aniero failed to produce any such evidence. (R5a).

Thus, it is clear that the only argument raised before the Appellate Division by the petitioners was that it was Aniero's burden to introduce evidence with respect to the scope of immunity provided by the Witness Protection Program. This argument obviously did not impress or persuade the Appellate Division. This argument is not the argument advanced in the Petition.

It is well settled that "it is essential to the jurisdiction of this Court in reviewing a State Court decision that the record affirmatively show not only that a Federal question was presented for decision to the highest Court of the State having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it." *Lynch v. State of New York,* 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934). Here, petitioners did not present to the Appellate Division the Federal question through which they now seek to invoke the jurisdiction of this Court. Furthermore, the Federal question allegedly presented in the Petition was not necessary to the Appellate Division's determination of the cause nor was it decided by the Appellate Division.

In rendering its May 6, 1985 decision, the Appellate Division based its ruling that New Jersey Evidence Rule 63(10) was unavailable to petitioners as a means of pre-

senting hearsay testimony to the jury, on the logical and reasonable grounds that Orlandini's statements "do not qualify as declarations against interest because they were made when Orlandini knew that *as a practical matter* he would be free of any adverse consequences from his words because of his entry into the government's witness-protection program. *R.* 63(10)." (Emphasis added) (4a). The Appellate Division's ruling merely stated that in the unique circumstances of this case, the hearsay statements of Orlandini were not admissible as an exception to the hearsay Rule under New Jersey Evidence Rule 63(10).

Thus, it is clear that the question presented for review, *i.e.*

> Does an individual's entry into the Federal Witness Protection Program *ipso facto* relieve that individual of his liability to penal sanctions and his liability for pecuniary judgments;

was not presented to the Appellate Division, nor was it considered or decided by that Court, and for that reason the Appellate Division's decision should not be reviewed by this Court.

B.

THE APPELLATE DIVISION DECISION INTERPRETING A STATE EVIDENCE RULE SHOULD NOT BE REVIEWED BY THIS COURT.

Petitioners' claim that the Appellate Division improperly excluded the hearsay statements of Orlandini from the jury. In rendering its decision, the Appellate Division interpreted New Jersey Evidence Rule 63(10). That Rule, along with a host of other Evidence Rules, was adopted in 1967 pursuant to an act of the New Jersey

Legislature. The history of the adoption of the New Jersey Rules of Evidence is set out succinctly in the Preliminary Comments to the Rules, prepared by the Honorable Vincent P. Biunno, U.S.D.J. (See R8a-R9a).

In *Greenough v. Tax Assessor of the City of Newport,* 331 U.S. 486, 91 L.Ed. 1621, 67 S.Ct. 1400 (1947) *reh. den.,* 332 U.S. 783, 92 L.Ed. 367, 68 S.Ct. 28 (1947), this Court had occasion to comment upon the ability of State Courts to interpret their own State's enactments. In *Greenough,* Justice Reid stated:

> State Courts construe their statutes according to their understanding of State policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final judicial authority upon the meaning of their State law. It is only in circumstances where their judgments collide with rights secured by the Federal Constitution that we have power to protect or enforce the federal rights. 331 U.S. at 497.

In the matter now before this Court, the Appellate Division of the Superior Court of the State of New Jersey has interpreted a New Jersey Evidence Rule, which pursuant to legislative mandate, was adopted through a process in which all three branches of New Jersey's Government participate. Clearly, the Appellate Division's decision interpreting a New Jersey Evidence Rule has not collided with petitioners' federal rights and therefore, that decision should not be reviewed by this Court.

C.

THE PETITIONERS HAVE NOT DEMONSTRATED THAT THERE IS ANY SPECIAL OR IMPORTANT REASON WHICH WOULD WARRANT THIS COURT EXERCISING ITS DISCRETION TO GRANT A PETITION FOR A WRIT OF CERTIORARI.

The decision of the Appellate Division interpreting New Jersey Evidence Rule 63(10) is neither novel nor unusual. It is the type of decision which is made regularly by State appellate tribunals. Notwithstanding the patently routine nature of the Appellate Division's ruling, and its clear limit to the facts of this case, petitioners have sought to transform the Appellate Division decision into one which "threatens the Witness Protection Program" (P23).[4]

Clearly, not even th most strained reading of the Appellate Division decision of May 6, 1985 would support an argument that it stands for the proposition that an individual's entry into the Federal Witness Protection Program *ipso facto* relieves that individual of his liability to penal sanctions and his liability for pecuniary judgments. No such statement is contained in the Appellate Division's decision nor can such a statement be reasonably inferred therefrom. The Appellate Division merely excluded evidence, which petitioners' admitted was hearsay, because in its opinion the unique circumstances of the individual who made those statements did not warrant the application of the declaration against interest exception [Rule 63(10)] to New Jersey's hearsay rule.

---

[4]P23 refers to Petition for Writ of Certiorari, page 23.

The position advanced in the Petition that "the decision of the Appellate Division threatens the Witness Protection Program" (P23) is a patently specious one. Nowhere in the Petition have petitioners advanced any valid argument that there exists some special or important reason warranting this Court's exercise of its discretionary review power. Having failed to articulate such reasons, their Petition for a Writ of Certiorari should be denied by this Court.

—o—

CONCLUSION

Petitioner has failed to demonstrate in its petition that the issue presented to this Court for review was presented to the Appellate Division for its consideration, and has likewise failed to demonstrate that the Appellate Division's interpretation of a New Jersey Evidence Rule is subject to this Court's review or that the decision is so novel and so important that it should be accepted by this Court for review. Therefore, respondent, Aniero Concrete Co., Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

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Dated: November 19, 1985

APPENDIX

NEW JERSEY EVIDENCE RULE 63(7). ADMISSIONS BY PARTIES.

A statement made by a person who is a party to an action is admissible against him in that action. Admissibility of statements by defendants in criminal actions is subject to Rule 8(3).

SUPREME COURT OF NEW JERSEY
C-1036 SEPTEMBER TERM 1984
24,111

ANIERO CONCRETE CO, INC.,

Plaintiff-Respondent,

vs.

ORLANDO-ANASTASI JOINT VENTURE, et al,

Defendants-Petitioners.

ON PETITION FOR CERTIFICATION

(Filed July 24, 1985)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4094-83T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 23rd day of July, 1985.

/s/ Stephen W. Townsend
Clerk of the Supreme Court

POINT III

BECAUSE THIS COURT'S REVERSAL OF THE TRIAL COURT'S RULING ON AN EVIDENTIARY QUESTION CONSTITUTED PREJUDICIAL ERROR, THIS COURT SHOULD REVERSE OR, IN THE ALTERNATIVE, REMAND FOR A NEW TRIAL.

A. *The Court Erred In Granting Aniero's Motion For Leave To Appeal The Evidentiary Ruling Of The Trial Court.*

One of the most firmly established of all jurisprudential propositions is that found in *Purdy v. Nationwide Mutual Ins. Co.*, 184 N.J. Super 123, 130 (App. Div. 1982):

> [T]he admission or exclusion of proffered evidence is a matter which resides within the sound exercise of discretion by the trial judge, *Dolan v. Newark Iron & Metal Co.*, 18 N.J. Super. 450, 455 (App. Div. 1952), and the exercise of that discretion will not ordinarily be disturbed unless there is a marked abuse of discretion. *State v. Wise*, 19 N.J. 59, 98 (1955). Reversal will follow only in cases of a clear abuse. *Schweizer v. MacPhee*, 130 N.J. Super. 123, 127 (App. Div. 1974).

Only after the Trial Court had heard extensive argument and considered briefs submitted by both parties did it rule on the admissibility of the proffered testimony of Carrochi. With all due respect to this Court, it is almost inconceivable that it could have found a "marked abuse of discretion" by the Trial Court in the limited argument presented to it by the parties and in the absence of even a cursory examination of the record.

Allowance of piecemeal appeals of evidentiary rulings in the midst of trial are extraordinarily disrupting to the "just determination, simplicity in procedure, fairness in administration and elimination of unjustfiable expense and

delay'' mandated by R.1:1-2 and should be looked upon with considerable disfavor.

This Court should reconsider and reverse its decision overruling the evidentiary ruling of the Trial Court in the absence of any hint of an abuse of discretion by the Trial Court and, in so doing, reverse or, in the alternative, remand for a new trial.

B. *The Court Erred In Reversing The Order Of The Trial Court Admitting The Proffered Testimony Under Evid. R. 63(10) and 63(7).*

Defendants sought to call Carrochi to testify concerning certain information she and Dunham learned from Orlandini during the course of two lengthy interviews with Orlandini. During these conversations, Orlandini related acts and conversations between Orlandini, Crevani and others. To the extent that these activities constituted verbal acts (such as Crevani's agreement to the scheme), there is no hearsay problem at all. Orlandini may properly describe such acts. *See, Ringwood Assoc. Ltd. v. Jack's of Rt. 23,* 166 N.J. Super. 36 (App. Div. 1979). To the extent that Orlandini related acts and conversations to Carrochi subject to the general hearsay rule, exceptions to the rule apply so as to eliminate any hearsay problem.

(1) *Crevani's statements.*

Orlandini may properly relate any acts or statements made by Crevani since they are admissible under Rule 63(7) as an admission of a party. Under this Rule "[a] statement made by a person who is a party to an action is admissible against him in that action." As the Comment to the Rule makes clear, the exception extends to

"*any* statement made by a . . . party . . . if the statement is offered against him. . . ." (emphasis supplied). Accordingly, Crevani's admissions, as related by Orlandini, are admissible against Crevani in their entirety.

(2) *Statements of Orlandini.*

Orlandini's statements in this context are admissible as an admission of a party under Rule 63(7) as well. Although Orlandini is a co-defendant in this action, the state of the pleadings is not dispositive as to whether the adversity requirement of the Rule is satisfied. *See, Sas v. Strelecki,* 110 N.J. Super. 14, 19 (App. Div. 1970). Since there exist a number of potential actions available to these defendants against Orlandini, the test of adversity is met and the statements are admissible.

As set forth above, when this Court reversed the decision of the Trial Court, it apparently relied on its perception of the scope of immunity, if any, from civil and criminal prosecution granted Orlandini in the Witness Protection Program. This perception could only have been based on what the Court thought it knew about the program. It most certainly was not based on the record as there was no evidence whatsoever before the Trial Court as to the terms and conditions of Orlindini's agreement with the government.

Inasmuch as it was Aniero that sought the *in limine* ruling from the Trial Court as to the admissibility of Carrochi's testimony, it was Aniero's burden to show that the *Evid. R.* 63(10) exception to the hearsay rule did not apply. Aniero failed to produce any such evidence.

Evid. R. 63(10) is completely dispositive of the issue of the Carrochi testimony as to what Orlandini told her:

> A statement is admissible if at the time it was made it was so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, except that such a statement is not admissible against a defendant other than the declarant in a criminal prosecution.

The statements made by Orlandini were, at the time they were made, so far contrary to his pecuniary or proprietary interest, so far subjected him to civil or criminal liability, and so far created a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statements unless he believed them to be true. This is the standard of admissibility that the Trial Court applied in the absence of any evidence to the contrary. Its decision should not have been disturbed. *Cf. State v. Gaines,* 147 N.J. Super. 84, 98 (App. Div. 1975), *aff'd o.b. sub nom., State v. Powers,* 72 N.J. 346 (1977).

That the testimony of Carrochi would be highly probative cannot be gainsaid. The jury should have been given the opportunity to decide for itself what weight to give Orlandini's statements. As the court held in *State v. Rechtschaffer,* 70 N.J. 395, 413 (1976):

> Declarations subsequent to the commission of the crime which indicate consciousness of guilt, or are inconsistent with innocence or tend to establish intent are relevant and admissible. *State v. Allen,* 53 N.J. 250 (1969).

The courts have long recognized the high probative value of declarations against interest. In *State v. Jackson*, 182 N.J. Super. 98, 101 (App. Div. 1981), the court, in ruling on an exclusion of a declaration against interest under *Evid. R.* 4, in language especially applicable here, held that:

> [T]he proffered declaration against interest is of obvious high probative value, tending as it does to establish defendant's opportunity to commit the crime. Second, the record does not support the finding that "the probative value of [the] statement is outweighed by the prejudice resulting to the defendant." As the Supreme Court observed in *Stoelting v. Hauck*, 32 N.J. 87 (1960):
>
> > . . . *The search for truth is ordinarily best served by the fullest disclosure of relevant facts and circumstances. In re Richardson*, 31 N.J. 391 (1960), *and any evidence which would aid the jury in that search, unless some specific rule forbids it, should ordinarily be admitted.* [at 103] (emphasis supplied)

This Court should reconsider and reverse its decision overruling the evidentiary ruling of the Trial Court under the circumstances existing here, and, in so doing, reverse or, in the alternative, remand for a new trial.

PRELIMINARY COMMENTS TO THE RULES

*Prepared by Hon. Vincent P. Biunno, U.S.D.J. of Newark, New Jersey.**

HOW THE RULES CAME INTO EXISTENCE

The Evidence Act, 1960 (L. 1960, c. 52) adopted as law Rules 1(1) through 1(13)—Definitions; Rule 2—Scope of the Rules; and Rules 23 through 40—Privileges.

The same law set up machinery for the adoption of other rules by the joint participation of all three branches of government. Briefly, this contemplates an initiating function in the Supreme Court, which may propose rules after discussion at a Judicial Conference, and by a filing with both Houses and with the Governor. Rules so proposed take effect on July 1 of the next year unless the Legislature disagrees, this to be expressed by joint resolution approved by the Governor. See N.J.S. 2A:84A-33 to 44.

This mechanism, involving as it does the participation of all branches of State Government, renders moot any question of promulgating authority. It is borrowed from the arrangement under which the federal court rules have

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* Judge Biunno served as chief counsel to the Bigelow Commission (1956) which prepared the text that became the foundation for The Evidence Act, 1960. As counsel to Governor Robert B. Meyner, he participated in the discussion between the Weintraub Court, the Legislature and the Governor that achieved the first enactment. He was a member of the Supreme Court Committee whose 1963 Report presented suggested text for rules to the Court, and attended the conferences with the Court that submitted the first official draft in 1964. Thereafter, he served as consultant to the several Legislative committees and finally to the Guarini Commission that achieved accommodations with the Court in 1967.

been promulgated, 28 U.S.C.A. sec. 2072 and 2076, as well as 18 U.S.C.A. Sec. 3771.

Rules were proposed by the Supreme Court in September, 1964. Their effective date was several times postponed. In 1967, by JR-5, changes in the language of some rules and deletion of others were set forth, with all the rules not already law to take effect September 11, 1967. In accordance with the joint resolution, a Supreme Court order was entered promulgating these rules as so modified.

(3)

Supreme Court, U.S.
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No. 85-678

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

UNITED PACIFIC INSURANCE CO.
and ORLANDO-ANASTASI JOINT VENTURE,
Petitioners,

v.

ANIERO CONCRETE CO., INC.,
Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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I. Introduction.

The Superior Court of New Jersey, Appellate Division ("Appellate Division") in its judgment and opinion entered May 6, 1985 (1a-5a)[1] held that on entering the federal Witness Protection Program ("Witness Protection Program")[2] an individual was relieved "of all claims,

1. Citations are to the Appendix accompanying the Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division.

2. The federal Witness Protection Program was created pursuant to the Organized Crime Control Act of 1970, Pub.L. No. 91-452,

charges and responsibilities to which he may be subject" (2a) and that after entering the program that individual was "free of any adverse consequences from his words *because of* his entry into the government's witness protection program." (4a). (emphasis added). Based upon that holding, the Appellate Division determined that an individual enrolled in the Witness Protection Program had neither penal risk nor pecuniary liability for pre-enrollment conduct. The Appellate Division then concluded, based on those two precedent steps, that statements made by an individual enrolled in the Witness Protection Program were not, and apparently could not be, declarations against interest and that therefore such statements were inadmissible despite a New Jersey Rule of Evidence permitting the admission of declarations against interest. N.J.R.Evid. 63(10). (59a).

The petitioners, United Pacific Insurance Co. ("United Pacific") and Orlando-Anastasi Joint Venture ("Joint Venture") have described in detail why the principal holding of the Appellate Division is wrong and how, if uncorrected, it could damage important federal interests. Respondent Aniero Concrete Co., Inc. ("Aniero Concrete") has filed a Response in Opposition to the Petition. Aniero Concrete advances three reasons why the Petition should not be granted. Each of these three reasons will be discussed below. Each is without merit. None of the three upsets the bases on which the Petition rests. The Appellate Division is wrong in its interpretation of an important federal program. If not corrected the opinion endangers that program.

NOTES *(Continued)*

§§501-04, 84 Stat. 922 (1970) *repealed by* Witness Security Reform Act of 1984 (12a-13a) and the Witness Security Reform Act of 1984, 18 U.S.C. §§3521-28, Pub.L. No. 98-473, 98 Stat. 2153.

II. The Arguments Advanced By Aniero Concrete Are Without Merit.

A. The Question Presented To This Honorable Court Was Presented To, And Decided By, The Appellate Division.

The consequences of an individual's entry into the Witness Protection Program was the central question addressed in the Petition for Writ of Certiorari.

The Appellate Division in its May 6, 1985 judgment and opinion unambiguously, albeit incorrectly, decided that question. The Appellate Division held that a consequence of an individual's entry into the Witness Protection Program was that the enrolled individual was relieved of all liability and penal risk for pre-enrollment conduct. The Appellate Division held:

> In return for his testimony, the government altered Orlandini's identity, thus in effect relieving him of all claims, charges and responsibilities to which he may be subject as Rudolph Orlandini.

(2a).

* * *

> They do not qualify as declarations against interest because they were made when Orlandini knew that as a practical matter he would be free of any adverse consequences from his words because of his entry into the government's witness-protection program. *R.* 63(10).

(4a).

The assertion by Aniero Concrete in its opposition to the Petition for Writ of Certiorari that the question presented to this honorable Court was not decided by the Appellate Division is without merit.

The assertion by Aniero Concrete that the question was not presented to the Appellate Division is equally

without merit. The Appellate Division decided the question. It was a necessary predicate for its conclusion. The question was presented.

During the trial, an interlocutory appeal on the admissibility of certain statements was taken by Aniero Concrete to the Appellate Division. The interlocutory decision of the Appellate Division reversing the trial court was based on a faulty understanding of the Witness Protection Program. (7a-8a). With this prior history, the post-trial appeal to the Appellate Division naturally included presentation of the question of the consequences of an individual's entry into the Witness Protection Program. Indeed the very portion of the Brief to the Appellate Division submitted by petitioners United Pacific and the Joint Venture quoted by Aniero Concrete reflects that the question was presented. The Appellate Division was asked to consider the "scope of immunity, if any, from civil and criminal prosecution granted Orlandini in the Witness Protection Program." (R5a).[3] United Pacific and the Joint Venture urged the Appellate Division to consider the consequences of entry into the Witness Protection Program based on the evidence presented at trial (of which there was none) and on any other basis provided to it. The Appellate Division did consider the scope of immunity. It did consider the consequences of an individual's entry into the Witness Protection Program. Its consideration resulted in its decision. As has been set forth earlier, that decision was wrong.

Moreover, the question was raised by United Pacific and the Joint Venture in their Petition for Certification of Appeal from Final Judgment of the Appellate Division, filed with the Supreme Court of New Jersey on June 28, 1985.[4] Section II.A(1) of that Petition is entitled:

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3. Citations designated (R a) are to the Supplemental Appendix filed on behalf of Aniero Concrete.

4. The Petition for Certification of Appeal from Final Judgment of the Appellate Division was denied without opinion on July 23, 1985. (6a).

The Appellate Division erred in deciding, without any evidence in the record but rather on the basis of the personal understanding of the individual judges, that because Orlandini was enrolled in the Program, he had no liability for his statements and that therefore the statements were not admissible under Evid.R. 63(10).

The contention of Aniero Concrete that the question presented by petitioner was not raised in or decided by the Appellate Division is without merit.

B. The Appellate Division's Decision Is Not Based On State Law But Was Dictated By Its Erroneous Interpretation Of The Federal Witness Protection Program.

The Appellate Division held that the statements sought to be admitted as declarations against interest pursuant to N.J.R.Evid. 63(10) (59a) could not be admitted. That decision was not based on any interpretation by the Appellate Division of N.J.R.Evid. 63(10). It was based on the Appellate Division's erroneous conclusion that an individual's entry into the federal Witness Protection Program relieved that individual of liability to penal sanctions and for pecuniary judgments. The decision of the Appellate Division was based on its interpretation of a federal program, its interpretation of federal statutes. That misinterpretation of a federal program and a federal statute was the key to its decision.[5]

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5. Had the Appellate Division correctly interpreted the Witness Protection Program it would have concluded that an individual enrolled in the program remained liable to penal sanctions and for civil liability for pre-enrollment actions. It then would have understood that an enrolled individual had interests. Having interests, the individual could indeed make declarations against interest and those declarations would be properly admissible.

The decision of the Appellate Division, based on its incorrect interpretation of a federal statute is properly before this honorable Court. In *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.* ____U.S. ____, 104 S.Ct. 2267 (1984) this honorable Court stated:

> It is equally well established, however, that this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law. In some instances, a state court may construe state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements. . . .
>
> In others, in contrast, the state court may construe state law broadly in the belief that federal law poses no barrier to the exercise of state authority. . . . In both categories of cases, this Court has reviewed the federal question on which the state law determination appears to have been premised. If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law.

____U.S. at ____, 104 S.Ct. at 2276-77. (citations omitted). *Accord, Michigan v. Long*, 463 U.S. 1032 (1983); *Standard Oil Co. of California v. Johnson*, 316 U.S. 481 (1942).

The contention of Aniero Concrete that this honorable Court should not review the decision of Appellate Division because it involves a state evidence rule is unsupported.

C. The Decision Of The Appellate Court Is Not Unimportant And, If Left Uncorrected, Would Have A Significant Detrimental Effect On The Witness Protection Program.

Aniero Concrete contends that the Petition for Writ of Certiorari should not be granted because the decision is "patently routine." That is incorrect.

As United Pacific and the Joint Venture have explained above, the decision is based on an incorrect interpretation of an important federal program. It is not a routine state evidentiary question.

United Pacific and the Joint Venture, in their Petition for Writ of Certiorari, set forth in detail the pernicious effects that the Appellate Division's decision could have on the Witness Protection Program. Aniero Concrete has not addressed those concerns. Rather, it has contended that this case is somehow limited to its facts. That contention is wrong. The Appellate Division held, as a necessary basis of its conclusion, that any individual's entry into the federal Witness Protection Program relieved that individual from liability.

Although the Appellate Division decision is not reported, it is not routine. It is wrong. It is important. It should be reviewed by this honorable Court.

III. Conclusion.

For all of the reasons set forth in this Brief and in the Petition for Writ of Certiorari, a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division should issue.

Respectfully submitted,

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Dated: December 3, 1985